



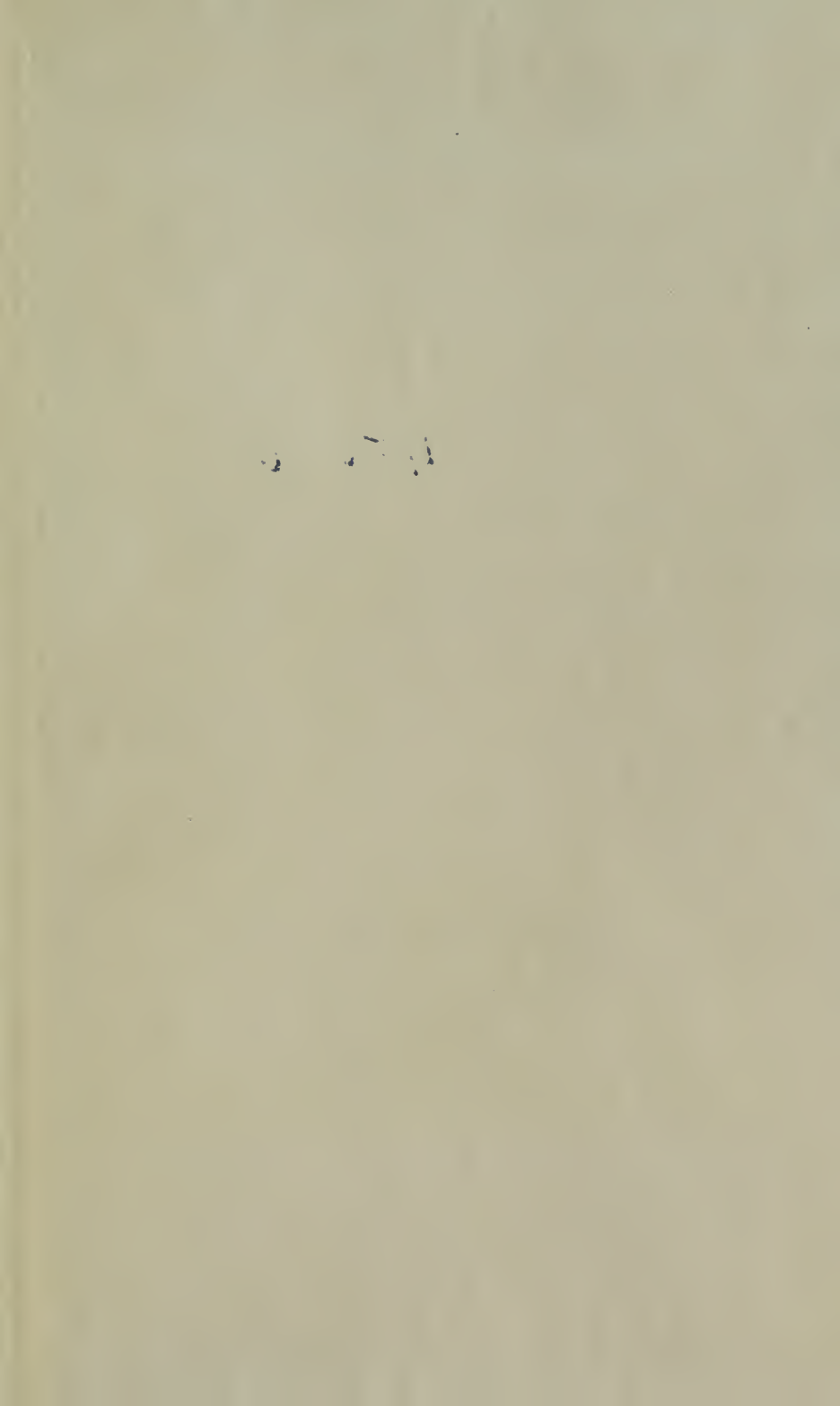
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No. 10190

United States
Circuit Court of Appeals

For the Ninth Circuit.

Vol 2326

see Vol 2325

STERLING CARR, as Trustee in Bankruptcy
of NIPPON YUSEN KABUSHIKI KAI-
SYA, a Corporation, Bankrupt, and FIDEL-
ITY AND DEPOSIT COMPANY OF MARY-
LAND, a Corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION,
LTD., a Corporation, and J. M. ANDERSEN,
Appellees.

(And Fourteen Consolidated Appeals.)

Apostles on Appeal

In Three Volumes

FILED

VOLUME I

AUG 20 1942

Pages 1 to 476

PAUL P. O'BRIEN,

CLERK

Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division

United States Circuit Court of Appeals
For the Ninth Circuit

STERLING CARR, as Trustee in Bankruptcy of NIPPON YUSEN
KABUSHIKI KAISYA, a Corporation, Bankrupt, and FIDEL-
ITY AND DEPOSIT COMPANY OF MARYLAND, a Corpo-
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Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD., a Corporation,
and J. M. ANDERSEN,

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(Title Continued on Succeeding Pages.)

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(Title Continued on Succeeding Pages.)

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Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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McHOSE & ADAMS,
634 South Spring Street,
Los Angeles, California.

For Appellees:

MESSRS. CLUFF & BULLARD,
403 West 8th Street,
Los Angeles, California. [1*]

In the United States Circuit Court of Appeals
for the Ninth Circuit
No. —

NIPPON YUSEN KABUSHIKI KAISYA, a
Corporation, et al.,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION,
LTD., a Corporation, and J. M. ANDERSEN,
Appellees.

CITATION

United States of America—ss.

To Hermosa Amusement Corporation, Ltd., a Corporation, and J. M. Andersen, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San

*Page numbering appearing at foot of page of original certified Transcript of Record.

Francisco, in the State of California, on the 15th day of June, A.D. 1942, pursuant to an order allowing appeal filed on May 5, 1942, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 1138-BH, Central Division, wherein Nippon Yusen Kabushiki Kaisya, a Corporation, Fidelity and Deposit Company of Maryland, a Corporation, and Sterling Carr, Receiver in Bankruptcy for Said Nippon Yusen Kabushiki Kaisya, are appellants and you are appellees to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Ben Harrison, United States District Judge for the Southern District of California, this 5th day of May, A. D. 1942, and of the Independence of the United States, the one hundred and sixty-sixth.

BEN HARRISON,

U. S. District Judge for the
Southern District of California.

Service of a copy of the foregoing Citation is acknowledged this 6th day of May, 1942.

ALFRED T. CLUFF,

CLUFF & BULLARD,

Attorney for Appellees.

[Endorsed]: Filed Jun. 26, 1942. [2]

[Title of Circuit Court of Appeals and Cause.]

CITATION

United States of America—ss.

To Hermosa Amusement Corporation, Ltd., a Corporation, and J. M. Andersen, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 15th day of June, A.D. 1942, pursuant to an order allowing appeal filed on May 5, 1942, in the Clerk's office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 1138-BH, Central Division, wherein Nippon Yusen Kabushiki Kaisya, a Corporation, Fidelity and Deposit Company of Maryland, a Corporation, and Sterling Carr, receiver in bankruptcy for said Nippon Yusen Kabushiki Kaisya, are appellants and you are appellees to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf. ✓

Witness, the Honorable Ben Harrison, United States District Judge for the Southern District of California, this 5th day of May, A.D. 1942, and of the Independence of the United States, the one hundred and sixty-sixth.

BEN HARRISON,

U. S. District Judge for the
Southern District of California.

Service of a copy of the foregoing Citation is acknowledged this 6th day of May, 1942.

ALFRED T. CLUFF,

CLUFF & BULLARD,

Attorney for Appellees.

[Endorsed]: Filed Jun. 26, 1942. [4]

In the District Court of the United States for
the Southern District of California, Central
Division.

In Admiralty No. 1138-BH

HERMOSA AMUSEMENT CORPORATION,
LTD., a California Corporation,

Libelant,

vs.

The Motor Vessel "SAKITO MARU", her En-
gines, Tackle, Apparel, Furniture, etc., and the
Master and Owners thereof, and N Y K Lines,
Nippon Yusen Kaisha Steamship Co., a Cor-
poration,

Respondents.

NIPPON, YUSEN KABUSHIKI KAISYA, a
Corporation,

Claimant and Petitioner,

HERMOSA AMUSEMENT CORPORATION,
LTD., a Corporation, J. M. ANDERSEN, DOE
ONE, DOE TWO, DOE THREE, DOE
FOUR, DOE FIVE and DOE SIX,

Third Party Respondents.

FIRST AMENDED LIBEL IN REM AND IN
PERSONAM FOR COLLISION DAMAGE

To the Honorable, the Judges of the United States
District Court for the Southern District of Cali-
fornia:

The first amended libel of Hermosa Amusement Corporation, Ltd. against the Japanese Motor Ves-
sel "Sakito Maru", her engines, tackle, apparel and
furniture, and all persons intervening for their in-
terest therein, and against Nippon Yusen Kabushiki
Kaisya (named in the libel as N Y K Lines, Nip-
pon Yusen Kaisha Steamship Co.), in a cause of
collision, civil and maritime, alleges as follows: [17]

I.

At all times herein mentioned the libelant was and
it now is a corporation, duly incorporated, organ-
ized and existing under the laws of the State of Cali-
fornia, having its principal office in the City and
County of San Francisco in said State. At the times
hereinafter mentioned the libelant was the sole
owner and operator of the fishing barge "Olym-
pic II".

II.

At the times herein mentioned the respondent
motor vessel "Sakito Maru" was a full powered
Japanese motor freighter, owned and operated by
the respondent, Nippon Yusen Kabushiki Kaisya,
and during the currency of process herein was in
the Harbor of Los Angeles and within the juris-
diction of the United States and of this Honorable
Court.

III.

On September 4, 1940, at or about the hour of 7:10 a. m., a collision occurred between the respondent motor vessel "Sakito Maru" and the libelant's fishing barge "Olympic II" in waters of the Pacific Ocean approximately $3\frac{1}{4}$ nautical miles from the lighthouse on the west breakwater of Los Angeles Harbor, bearing 162° true from said lighthouse, whereby the fishing barge "Olympic II" was sunk and became, with all her tackle, apparel, furniture and equipment, a total loss.

Upon the libelant's information and belief, the facts and circumstances of the said collision were as follows:

The fishing barge "Olympic II" was an iron, unrigged, non-self-propelled fishing barge of 1766 gross tons, 258 feet long, 38 feet beam and 22.8 feet deep. She was built in 1877 at Belfast, Ireland and rigged as a sailing ship, being then named the "Star of France". In the year 1933 she was dismantled and converted to a fishing barge, and from about May 1934 [18] until September 4, 1940 was operated by the libelant in waters of the Pacific Ocean near the port of Los Angeles in the business of furnishing accommodations and facilities to members of the public to fish.

On or about May 10, 1940, at the beginning of the pleasure fishing season in Southern California waters, the "Olympic II" was anchored off the port of Los Angeles in approximately the position hereinabove described, and thereafter, continuously and until the said collision, remained at anchor at said

place. The libelant used due diligence to make the said vessel seaworthy and, until the said collision, she was at all times tight, staunch and strong, sufficiently manned, equipped and supplied, and in all respects seaworthy and fit for the service in which she was engaged.

The said place of anchorage is commonly known as Horseshoe Kelp, and for many years has been and is known and used as a fishing ground. At all times from about May 10, 1940 until the said collision there were continuously anchored at said Horseshoe Kelp the "Olympic II" and two other fishing barges, all within a distance of one-half mile from each other. At all of said times a large number of self-propelled vessels of various sizes anchored daily on the said Horseshoe Kelp for the purpose of fishing.

On the morning of September 4, 1940 the "Sakito Maru", a full powered twin screw motor freighter, approximately 500 feet long, of 7126.32 tons gross register, and with a normal cruising speed of 118 engine revolutions of 16 knots per hour, was proceeding toward Los Angeles from the Panama Canal, and approaching Los Angeles Harbor on a general northwesterly course.

The night of September 3-4, 1940 was clear until about 4:30 a. m. on September 4th. At all times the sea was calm, with little or no wind. At about 4:30 a. m. a fog set in, [19] which continued with varying density until after the time of collision. At 4:30 a. m., on account of said fog, the night watchman of the "Olympic II" started ringing on the "Olym-

pic II's" bell the regulation fog signals for a vessel at anchor, and thereafter and until the said collision continued to ring said fog signals whenever and as long as the density of the fog was sufficient materially to impair visibility. Fog signals were also rung during said time by two other barges in said area and by other vessels lying at anchor therein.

Daylight came at approximately 5:15 A. M. and at 5:40 A. M., or thereabouts, it was broad day and the anchor lights of the "Olympic II" were extinguished. At that time the fog was light and visibility was in excess of half a mile. The fog continued with varying density until the time of the accident, and at no time during said period nor at the time of the accident was the visibility less than a quarter of a mile or thereabouts. At all times from 6:00 A. M. until the appearance of the "Sakito Maru" the "Olympic II's" bell was being rung constantly at approximately 60 second intervals, with peals of several seconds duration.

At about 6:40 A. M. the first shore boat of the day arrived at the "Olympic II" and put on board 14 patrons, who thereupon engaged or prepared to engage in fishing along the vessel's rails. A few minutes after 7:00 A. M. a second boat arrived, bringing 4 additional patrons. Said last mentioned shore boat was still lying at the "Olympic II's" starboard gangway when the collision occurred.

At about 6:50 A. M. or thereabouts the fog signal of a powered vessel was heard far away and apparently to the south of the "Olympic II". The

watchman on the "Olympic II", stationed at the bell and ringing the same, as required by law, kept a [20] sharp lookout to the southward and listened intently for a repetition of the fog signals, but heard no further signals. At about 7:05 A. M. the "Sakito Maru" appeared broad on the port bow of the "Olympic II", about 2000 feet or more distant, coming apparently from the south at a speed of from 8 to 10 knots per hour, or thereabouts, and on a heading which apparently would carry her past the "Olympic II". From the moment the "Sakito Maru" was sighted and until a collision was imminent, the fog bell on the "Olympic II" was rung loudly and continuously. As the "Sakito Maru" approached she altered her course to her own starboard and, apparently without diminishing her speed, headed directly for the "Olympic II's" port side amidships. No lookout or other person was visible on the "Sakito Maru's" bow.

At approximately 7:10 the bow of the "Sakito Maru" crashed into the "Olympic II's" port side amidships, tearing a great hole in and penetrating more than 20 feet into the "Olympic II's" hull to a point beyond the line of her keel. The impact caused the "Olympic II" to list to starboard, and the momentum of the "Sakito Maru" caused the "Olympic II" to be torn from her anchors and to be driven broadside to starboard a distance of several hundred feet. Shortly after the collision the "Sakito Maru" reversed her engines, pulled her bow out of the hole in the "Olympic II's" side, and thereafter backed away and came to anchor. The "Olym-

pic II" immediately started to fill with water and to sink.

The three members of the "Olympic II's" crew immediately assembled the "Olympic II's" patrons on deck at the midship house, served out life preservers to all on board, and assisted the passengers in donning and adjusting the same. All patrons and members of the crew were fitted with life preservers. The shore boat "Lillian L", which was lying at the "Olympic II's" [21] starboard gangway, although driven violently broadside by the impact of the collision and made to take considerable water into her hull, still remained able to function. Seven persons were taken on board the "Lillian L" and she pulled away from the "Olympic II". A water taxi, the H-10 No. 17, was drifting a few hundred feet from the "Olympic II" at the time of the collision. Her operator immediately brought said water taxi alongside the "Olympic II" and ten persons were transferred to said water taxi. While the water taxi was still alongside taking persons on board, the "Olympic II" sank, carrying with her seven and possibly eight persons, who, although equipped with life preservers, were carried down in the suction of the sinking vessel and perished. The "Sakito Maru" came to anchor a considerable distance from the "Olympic II". At no time following the collision did she give or send any aid to the "Olympic II" or to those on board, except that half an hour or more after the collision the "Sakito Maru" launched a lifeboat, which ulti-

mately came to the place where the "Olympic II" had sunk.

IV.

The said collision and the consequent sinking and total loss of the "Olympic", her tackle, apparel and furniture, were not caused by or contributed to by any design, fault, want of care, or neglect on the part of the "Olympic II", her master or crew, or of the libelant, but were solely due to the fault and negligence of the respondents and of those in charge of the respondent motor vessel "Sakito Maru" in the following respects:

(a) The "Sakito Maru", without necessity therefor, was proceeding on a course directly across the said Horseshoe Kelp, whereat her master and officers knew or should have known fishing vessels would be at anchor.

(b) The "Sakito Maru" was proceeding at an immoderate [22] rate of speed in the fog then and there prevailing.

(c) The "Sakito Maru" did not have a proper and efficient lookout, properly stationed and attentive to his duties.

(d) The "Sakito Maru's" master, watch officers and crew were incompetent and inattentive to their duties and improperly stationed.

(e) The "Sakito Maru" failed to stop and reverse immediately upon sighting the "Olympic II".

(f) The "Sakito Maru" failed to take immediate and proper measures on sighting the "Olympic

II" to alter her course so as to avoid striking said vessel and, on the contrary, altered her course to starboard so as to strike the "Olympic II" amidships.

(g) The "Sakito Maru" failed to sound proper fog signals while proceeding through the fog.

(h) Following the collision with the "Olympic II", the "Sakito Maru" negligently maneuvered her engines so that her bow was withdrawn out of the wound in the "Olympic II's" side and drew away from the "Olympic II", permitting the "Olympic II" to sink.

(i) The "Sakito Maru" failed to make proper or any efforts to give or send aid to the "Olympic II" and to those on board the "Olympic II" put in peril by reason of the collision.

(j) And the "Sakito Maru" was negligent in other and further particulars of which the libellant is not now advised, and as to which the libellant begs leave to offer proof as and when advised and to amend this libel accordingly.

V.

As a result of said collision and of the fault and neglect of the respondents and those in charge of the "Sakito Maru", in the respects aforesaid, the "Olympic II" sank in approximate- [23] ly 100 feet of water and became and remains, with her tackle, apparel and furniture, a total loss; whereby the libellant has suffered damage in the approximate

sum of \$75,000.00, for which the libellant prays reparation, with interest.

VI.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the libellant prays that process in accordance with the course of this court, in causes of admiralty and maritime jurisdiction, may issue against the respondent motorship "Sakito Maru", her engines, tackle, apparel and furniture; that the respondent, Nippon Yusen Kabushiki Kaisya, and all persons claiming any interest in the respondent motor vessel "Sakito Maru", may be cited to appear and answer upon oath the matters aforesaid; that this court be pleased to decree the payment to the libellant of its damages, with interest and costs; that the respondent motor vessel may be condemned and sold to pay the same, and that the libellant may have such other and further relief as may be just and proper in the premises.

ALFRED T. CLUFF,
HUGH B. ROTCHFORD,
GEORGE H. MOORE,
CLUFF & BULLARD,

Proctors for Libellant. [24]

(Duly verified.)

[Endorsed]: Filed Jul. 31, 1941. [25]

[Title of District Court and Cause.]

CLAIM OF NIPPON YUSEN KABUSHIKI
KAISYA, A CORPORATION

Now, before this honorable Court, appears Nippon Yusen Kabushiki Kaisya, a corporation of the Empire of Japan, owner of the Japanese Motorship "Sakito Maru" her motors, engines, tackle, apparel and furniture by M. Higashikuze, its resident manager, and makes claim to the said vessel, etc., and avers that it is the true and bona fide owner of said vessel, etc., and that no other person is the owner thereof.

Wherefore, it prays to defend said suit accordingly.

NIPPON YUSEN KABU-
SHIKI KAISYA, a Corpora-
tion.

By M. HIGASHIKUZE,
Resident Manager. [27]

State of California,
County of Los Angeles—ss.

M. Higashikuze, being first duly sworn, deposes and says:

That Nippon Yusen Kabushiki Kaisya, a corporation of the Empire of Japan, is the true and bona fide owner of the Japanese Motorship "Sakito Maru", her motors, engines, tackle, etc., against which suit has been commenced by Hermosa Amusement Corporation, Ltd., a California Corporation,

libelant; that at the time of the commencement of this suit the said Japanese Motorship, her motor, engines, tackle, etc., was in the lawful possession of said owner; that deponent is Resident Manager at Los Angeles, California, of Nippon Yusen Kabushiki Kaisya, a corporation of the Empire of Japan, and is duly authorized by said owner to put in this claim.

M. HIGASHIKUZE,
Resident Manager.

Subscribed and sworn to before me this 7th day of September, 1940.

NORMAN B. COWELL,
Notary Public in and for said
County and State.

[Endorsed]: Filed Sep. 7, 1940. [28]

[Title of District Court and Cause.]

STIPULATION AND BOND FOR RELEASE

Know All Men by These Presents:

Whereas, the above named libelant has filed, or is about to file herein, a libel upon a certain claim in the total amount of \$200,000.00 against the Japanese Motorship "Sakito Maru", etc.

Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland with principal place of business in Baltimore, Maryland; and

Whereas, said Japanese Motorship "Sakito Maru", etc. has been, or is about to be, seized and attached by the United States Marshal for the Southern District of California, under and by virtue of process issued by the above entitled Court; and,

Whereas, Nippon Yusen Kabushiki Kaisya, a corporation of the Empire of Japan, has filed, or is about to file, a claim to said "Sakito Maru", as owner thereof, and a Stipulation for Costs in the usual form; [29] and is applying for the release of said "Sakito Maru" from said seizure and attachment, all in accordance with the Admiralty rules and practice of the above entitled Court; and

The parties hereto hereby consenting that in case of default or contumacy on the part of the principal or surety, execution to the amount of Forty Thousand Dollars (\$40,000.00) may issue against their goods, chattels and land.

Now Therefore, the said Nippon Yusen Kabushiki Kaisya, a corporation of the Empire of Japan, as principal, and Fidelity & Deposit Company of Maryland, a corporation, qualified to act as a surety in this Court, as surety, are held and firmly bound unto Robert E. Clark, United States Marshal for the Southern District of California, his successors, heirs, executors, administrators and assigns, and unto libellant herein, in the full sum of Forty Thousand Dollars (\$40,000.00), for the payment of which sum the said principal and surety bind themselves, their respective successors and assigns, firmly by these

presents; the condition of this obligation being such that if the said Nippon Yusen Kabushiki Kaisya, a corporation as principal herein, shall abide by and perform all orders of this Court in said cause, interlocutory or final, and shall pay whatever amount may be awarded against said Nippon Yusen Kabushiki Kaisya, as claimant herein by the final decree rendered in said cause by this Court, or by an appellate Court, if an appeal intervene, with interest, (not exceeding the said full penal sum of \$40,000.00), then this obligation to be void; otherwise, the same shall remain in full force and effect.

In Witness Whereof, the said parties hereto have hereunto [30] affixed their hands and seals this 7th day of September, 1940.

NIPPON YUSEN KABU-
SHIKI KAISYA, a Corporation,

By M. HIGASHIKUZE,
Resident Manager.

[Seal] FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

By W. H. CANTWELL,
Attorney in Fact.

THERESA FITZGIBBONS,
Agent.

(Duly verified.)

Examined and recommended for approval as provided in Rule 13.

LILLICK, GEARY, McHOSE &
ADAMS,
By JOHN C. McHOSE,
Proctors for Claimant, Nip-
pon Yusen Kabushiki Kai-
sya, a Corporation.

I hereby approve the foregoing bond this 7th day
of September, 1940.

BEN HARRISON,
United States District Judge.

[Endorsed]: Filed Sep. 7, 1940. [31]

[Title of District Court and Cause.]

ANSWER TO LIBEL OF HERMOSA AMUSE-
MENT CORPORATION, LTD., AND IN-
TERROGATORIES.

To the Honorable, the Judges of the United States
District Court for the Southern District of
California, Central Division:

Nippon Yusen Kabushiki Kaisya, a corporation
(sued herein under the name of N. Y. K. Lines,
Nippon Yusen Kaisha Steamship Co., a corpora-
tion), as respondent herein and as claimant for and
on behalf of the respondent Motor Vessel "Sakito
Maru", her motors, tackle, apparel, furniture, etc.,

in answer to the libel filed herein by Hermosa Amusement Corporation, a corporation, admits, denies and alleges as follows:

1) Claimant-respondent alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Article I, and therefore and on that ground, denies said allegations. [32]

2) Answering Article II, admits that the "Sakito Maru" is a vessel registered under the laws of the Empire of Japan and was, during the currency of process herein, in the Southern District of California and within the jurisdiction of this Honorable Court. Admits that at all times mentioned in said libel, S. Sato was the master of said vessel. Admits that at all times mentioned in said libel, Nippon Yusen Kabushiki Kaisya was, and now is, a corporation, incorporated, organized and existing under and by virtue of the laws of the Empire of Japan and that at all of said times was, and now is, the owner and operator of the "Sakito Maru", her motors, tackle, apparel, furniture, etc. Except as herein expressly admitted, denies each and every allegation of Article II.

3) Answering Article III, admits that on or about September 4, 1940, at about the hour of 7:10 o'clock A. M., on the high seas of the Pacific Ocean, at a point about $31\frac{1}{2}$ nautical miles in a direction 162° true from the lighthouse at the end of the west breakwater at the entrance to Los Angeles Harbor, California, a collision occurred between the

“Sakito Maru” and the fishing barge “Olympic II”. Admits that following said collision the “Olympic II” sank, and as a result of said collision the “Sakito Maru” sustained substantial damage, to an extent hereinafter described. Alleges that it has no information or belief sufficient to enable it to answer the allegations contained in Article III that by reason of the sinking of the fishing barge “Olympic II” her equipment and effects were totally lost, with the loss of seven lives, and basing denial upon that ground, denies each and every, all and singular, generally and specifically, said allegations. Denies each and every allegation contained in Article III except as herein expressly admitted or otherwise denied.

4) Denies the allegations of Article IV, except as herein- [33] after expressly admitted.

Claimant-respondent is informed and believes, and upon such information and belief alleges, that the facts and circumstances of said collision are as follows:

The fishing barge “Olympic II”, a schooner built sixty-three years ago was recently converted into a pleasure fishing barge. The “Olympic II” had an iron hull, was approximately two hundred thirty-eight (238) feet in length and thirty-eight (38) feet in width, with a depth of twenty-two (22) feet. Except for a bulkhead near the stem, said fishing barge had no other bulkheads, so that her lower hold was open from the bulkhead aforementioned to the stern. There were stowed in this

open lower hold approximately fifteen hundred (1,500) tons of ballast, consisting of gravel, sand and heavy cement blocks.

At the time of the collision aforementioned, at or about 7:10 o'clock A. M., on or about September 4, 1940, the "Olympic II", unknown to the master and officers of the "Sakito Maru", was anchored at a point about $3\frac{1}{2}$ nautical miles in a direction 162° true from the lighthouse at the end of the west breakwater at the entrance to Los Angeles Harbor, California, without permit or license from any Governmental body or agency, directly in the steamer lane for all vessels plying between Los Angeles Harbor and the Panama Canal and other ports between Los Angeles Harbor and the Panama Canal. At the time of the collision there was no person aboard said fishing barge licensed by the United States Bureau of Marine Inspection and Navigation, either in the capacity of master, officer, able bodied seaman, or ordinary seaman. At said time there were aboard the "Olympic II" three employees of libelant, three employees in a concession or eating place aboard said fishing barge and eighteen people or passengers who had been transported to [34] said fishing barge from the shore that morning aboard shore boats operated by libelant for the purpose of engaging in pleasure fishing.

The "Sakito Maru", at the time of the collision, was on a voyage from New York to Yokohama via the Panama Canal and Los Angeles Harbor. Until immediately prior to the collision and since noon,

September 3, 1940, the "Sakito Maru" was steering a course of 340° true. For several hours prior to the events in question on September 4, 1940, there had been on the bridge of the "Sakito Maru", in charge of her navigation, the first officer, and in addition, an apprentice officer and a quartermaster, acting as helmsman. At about 7 o'clock A. M., of said day, S. Sato, master of the "Sakito Maru", came on the bridge and he and the other persons aforementioned remained on the bridge during the events hereinafter related and until and after the collision.

At 7 o'clock A. M., September 4, 1940, the "Sakito Maru" was proceeding on the course aforementioned, to-wit, 340° true, at a speed of about sixteen knots per hour, with her engines at full ahead. At this time the weather was clear with practically full visibility off the starboard and port sides of the vessel and to the stern but some distance ahead of the vessel there appeared to be a haze or mist. At about 7:03 o'clock A. M. the range of visibility ahead decreased to approximately one-half ($\frac{1}{2}$) a mile, and at this time the speed of the vessel was reduced to slow ahead, the sounding of regulation fog signals was commenced on the whistle and an A. B. sailor took the position of lookout at the bow of the vessel. Commencing with the time aforementioned fog signals were sounded by the apprentice officer of the "Sakito Maru" at approximately one minute intervals, each signal consisting of a single blast on the whistle of from about five (5) to six (6)

seconds in duration, and these signals were continually sounded at the intervals [35] and in the manner mentioned, until the time of the collision. During this period the master, chief officer and lookout maintained a careful watchfulness and the helmsman remained at the wheel, as aforementioned.

At about 7:09 o'clock A. M., while the "Sakito Maru" was proceeding with her engines at slow ahead, on a course of 340° true, as aforementioned, and while the master, first officer, an apprentice officer and a helmsman were on the bridge in the performance of their duties, as aforementioned, and a lookout was stationed at the bow of the vessel as aforementioned, the lookout at the bow sighted the "Olympic II" dead ahead of the "Sakito Maru" and lying at nearly right angles to her projected course and immediately notified the officers on the bridge of the presence of the fishing barge. Immediately thereafter the helm of the "Sakito Maru" was put hard to starboard, in an effort to change the course of the "Sakito Maru" so as to clear the stern of said fishing barge, the engines were stopped and put full astern and three blasts were sounded on the whistle.

Because of the distance required to change the heading of a vessel of the size and nature of the "Sakito Maru" the vessel had only commenced to swing or change her heading at the time of the impact. The collision occurred at about 7:10 o'clock A. M., the stem of the "Sakito Maru" striking the port side of the "Olympic II" nearly amid-

ships. The impact checked the forward momentum of the "Sakito Maru", and since at that time the engines were turning full astern and the propellers were in reverse motion, the "Sakito Maru" was caused to immediately gain a slight sternway and to separate from the barge. The engines were stopped at about the time of the impact but the time required to stop the propellers in their reverse motion was sufficient to permit the vessel to gain sternway and to [36] cause her to separate from the barge immediately after the impact, as aforementioned.

Upon the "Sakito Maru" being separated from the fishing barge, the master of the "Sakito Maru" considered it would be an unwise and a hazardous undertaking to attempt to move the vessel forward again in an effort to nose the bow into the hole stove in the side of the barge, it being possible and probable that such a maneuver might have resulted in the "Sakito Maru" striking the barge in a different place or that her forward momentum could not be checked before the fishing barge might be pushed or caused to list, thus further endangering the lives and safety of those aboard. Accordingly, after the "Sakito Maru" had separated from the fishing barge and her engines were stopped, the engines were again put astern and the vessel backed a sufficient distance to give safe and proper clearance for dropping anchor. While the vessel was backing for this purpose, preparations were under way for dropping the anchor and for lowering a

lifeboat. The engines of the "Sakito Maru", after this maneuver, were stopped at 7:15, the anchor was let go at 7:17, the engines were ordered slow ahead to check the sternway at 7:18, and the engines were then stopped again at 7:19. Immediately after the engines were stopped at 7:19 and the vessel came to rest in the water, a lifeboat was lowered at 7:20 A. M.

In the meantime, the "Olympic II" sank and the lifeboat after being launched, was immediately directed to the area where the barge had sunk for the purpose of locating and rescuing any persons who might be found in the water. This search was continued by the lifeboat for two hours, during which time the "Sakito Maru" remained at anchor. Before the lifeboat returned to the "Sakito Maru" a Coast Guard cutter arrived at the scene and joined with other small boats in the vicinity to search for persons who might [37] be found in the water. When this search was unavailing and no further assistance could be rendered by the "Sakito Maru", the vessel hoisted anchor at 11:57 A. M. and proceeded to the outer harbor of Los Angeles Harbor, where the vessel anchored until towed to shipyards for survey and temporary repairs.

At no time prior to the sighting of the "Olympic II" by the lookout on the "Sakito Maru" were any bells, signals or other warnings from said fishing barge heard by anyone aboard the "Sakito Maru", nor were any bells, signals or other warnings from any other fishing barge or craft anchored in the vicinity of the fishing barge "Olympic II" heard by

anyone aboard the "Sakito Maru".

5) Denies the allegations of Article V. Alleges in this respect that at all times mentioned herein, the "Sakito Maru" was in all respects seaworthy and properly equipped and supplied, was manned by a competent crew, was well and carefully navigated, was maintaining a proper and efficient lookout and was observing all the rules and regulations applicable to a vessel in her situation.

Alleges the "Sakito Maru" committed no fault or negligence in the premises and alleges upon information and belief that collision was solely due to, and proximately caused by, the carelessness and negligence of the "Olympic II" and libellant, Hermosa Amusement Corporation, Ltd., a corporation, in the following respects:

A. The fishing barge "Olympic II" was negligently, recklessly and unnecessarily anchored at a point about $3\frac{1}{2}$ miles outside the main entrance to Los Angeles-Long Beach Harbor, directly in the steamer lane of vessels approaching Los Angeles-Long Beach Harbor from the south so as to constitute a dangerous menace to navigation, particularly during foggy and misty weather as prevailed at the time of the collision, and so as to endanger the safety not only of the barge itself and all persons aboard, but the safety of all vessels [38] approaching Los Angeles-Long Beach Harbor from the south in such regular steamer lane.

B. Despite the fact that said fishing barge constituted a dangerous menace to navigation for the

reasons and in the manner aforementioned and that the libelant knew said fishing barge was anchored in said regular steamer lane, the libelant utterly failed and neglected to furnish any notice or to cause any notice to be furnished to mariners or masters of vessels of the location of said fishing barge.

C. The "Olympic II" did not have an adequate or proper fog bell, or other sound signalling device, and did not sound proper and regulation fog signals so as to provide a warning to the approaching "Sakito Maru".

D. The "Olympic II" was grossly undermanned and incompetently manned, there being no person aboard said fishing barge as an officer or a member of the crew thereof, who held any license from the United States Bureau of Marine Inspection and Navigation, or who was experienced in navigation or who possessed an adequate or any knowledge of the rules for the prevention of collisions.

E. The "Olympic II" was in a grossly unseaworthy and unsafe condition in the following particulars, among others:

(a) Said fishing barge was entirely open and unprotected by collision bulkheads in her lower hold, from a point twenty (20) feet abaft her stem, for a distance of some two hundred eighteen (218) feet to her stern.

(b) There were stowed in said open and unprotected lower hold throughout the entire length of said fishing barge, fifteen hundred (1500) tons of ballast, consisting, among other things, of rock and gravel and heavy cement blocks.

(c) There was carried aboard said fishing barge, only [39] one lifeboat, capable of accommodating only twenty persons, which was so affixed to said fishing barge that it required a boom and a winch to raise and lower said lifeboat into the water, which operation would consume at least five minutes time.

F. Although approximately three months prior to the date of said collision the libelant, Hermosa Amusement Corporation, Ltd., was ordered by the Bureau of Marine Inspection and Navigation to make various structural and other changes to correct the unseaworthy and unsafe condition of said fishing barge, said libelant wholly failed and neglected to make any of said changes and wholly and utterly ignored the requirements of the Bureau of Marine Inspection and Navigation. The aforesaid requirements of the Bureau of Marine Inspection and Navigation, with which said libelant failed to comply, included, among other things, the following:

(a) The structure comprising the keel, stem, stern-frame, keelsons, stringers, frames, beams, decks, bulkheads, ceilings, sheathings, planking, plating, fastenings, etc., including also the frames, beams, plating or planking of superstructures, deck houses, etc., and all holds, bilges, peaks and tanks, shall be thoroughly inspected and necessary tests shall be made to determine actual conditions and suitable repairs, renewals or replacements effected where found necessary.

(b) A sufficient number of transverse water-tight bulkheads shall be fitted so that the vessel will

remain afloat with positive stability in the event any one main compartment is flooded.

(c) The structural strength of the vessel shall be in all respects sufficient.

(d) All spars, rigging and gear shall be placed in a safe condition, or removed if unnecessary. [40]

(e) An inclining test shall be made by a representative of the Bureau.

(f) All gangways, accommodation ladders and stairways, shall have suitable manropes on each side. All side gangways and ladders shall be of rugged construction. All running gear such as tackles, hooks, shackles, bridles, etc. shall be of suitable dimension and in good condition.

(g) There shall be one set of side lights suitably screened visible at least two miles.

(h) There shall be an efficient fog bell.

(i) There shall be one mechanical fog horn.

(j) There shall be a basket or other efficient signal for the purpose of indicating the side of the fishing vessel approaching vessels may pass.

(k) There shall be at least ten square feet of deck space available for each person allowed on board.

(l) A log book shall be kept in which a daily record of the number of persons on board during the day shall be entered.

(m) All bilges, holds, compartments, etc., shall be free of all rubbish, waste, oil, etc.

(n) Approved lifeboats with suitable launching arrangements and approved life rafts or buoyant

apparatus, shall be carried sufficient to provide accommodations for all persons on board. Fifty percent of such accommodations may be in lifeboats, and fifty percent may be in life rafts or buoyant apparatus.

(o) There shall be floodlights on both sides of the vessel on vessels with persons on board other than crew during the night time.

(p) A sufficient complement of licensed officers and certificated seamen, including lifeboatmen, shall be carried as may [41] be required to adequately deal with any emergency that may arise, and a licensed deck officer shall be in command of the vessel.

(q) The minimum crew while vessel is at anchor with persons other than crew on board shall be:

1 licensed master

1 licensed engineer

Sufficient certificated lifeboatmen to adequately launch and man all lifesaving equipment, 65% of which shall be able seamen.

G. The persons aboard said fishing barge in the employ of libelant, Hermosa Amusement Corporation, Ltd., who were supposedly the crew thereof, were grossly incompetent, negligent and inattentive to their duties.

H. The "Olympic II" had no proper or sufficient, or any, lookout.

I. The "Olympic II", the persons aboard said fishing barge in the employ of the libelant, Hermosa Amusement Corporation, Ltd., and the libelant,

Hermosa Amusement Corporation, Ltd., were negligent and at fault in other respects as to which claimant-respondent is not now advised, but as to which it begs leave to offer proof of, as and when advised, and to amend this answer accordingly.

6) Answering Article VI, denies that by reason of said collision libelant has suffered damage in the loss of said fishing barge "Olympic II", her engines, tackle, apparel, furniture, etc., or otherwise, in the sum of Two Hundred Thousand Dollars (\$200,000.00), or any other sum, or at all.

7) Answering Article VIII, denies that all or singular the premises are true, but admits that if true the same are within the admiralty and maritime jurisdiction of the United States and of this [42] Honorable Court.

8) Following said collision and at or about 7:14 o'clock A. M. on September 4, 1940, the fishing barge "Olympic II" sank in the waters of the Pacific Ocean, at the point where said collision occurred and has not since been raised. Said collision was proximately caused and contributed to by the negligence and fault on the part of the "Olympic II" and libelant, Hermosa Amusement Corporation, Ltd., as aforesaid. As a result of said collision, the respondent vessel "Sakito Maru" sustained damage, the repair of which required the reasonable and necessary expenditure of an amount which cannot be ascertained at present but which is estimated at the sum of \$45,000.00, no part of which has been paid claimant by libelant. The temporary and permanent repair of the damage to the "Sakito Maru"

necessarily made as a result of said collision occupied and required thirty (30) days for completion, during which period the claimant lost the entire use of said vessel and incurred various maintenance and detention expenses. Upon information and belief the reasonable value for the use of the "Sakito Maru", including such maintenance and detention expenses, amounted to the sum of \$500.00 per day. Claimant-respondent has been damaged in the sum of \$45,000, or thereabouts, on account of repairs as aforesaid, and in the further sum of \$15,000, or thereabouts, on account of said loss of use of said vessel, including said maintenance and detention expenses, totaling the sum of \$60,000, together with interest thereon from the time of such expenditures and such loss of use at the rate of 7% per annum.

Wherefore, claimant-respondent prays that libelant take nothing by reason of its libel, that said libel be dismissed, and that claimant-respondent have and recover from libelant its costs of suit incurred herein, and for such other and further relief [43] as may be just and meet in the premises.

LILLICK, GEARY, McHOSE
& ADAMS,

JOHN C. McHOSE,
JAMES L. ADAMS,

Proctors for Claimant-
Respondent.

634 South Spring Street,
Los Angeles, California. [44]

[Duly Verified.] [45]

INTERROGATORIES PROPOUNDED TO LIBELANT, HERMOSA AMUSEMENT CORPORATION, LTD., AND REQUIRED TO BE ANSWERED IN WRITING UNDER OATH.

1. Fix the point where the "Olympic II" was anchored at the time of collision, giving bearings and distances from shore points on which bearings were taken.

2. (a) State whether any notice that the "Olympic II" was anchored at that point was ever given the Bureau of Marine Inspection and Navigation, the United States Hydrographic office, or any other United States Governmental authority, and if so, state when such notice was given, and if it was in writing, attach a copy, to your answers to these interrogatories.

(b) State whether any United States Governmental authority or any other person or agency was ever requested to or did notify ship operators of the presence of the "Olympic II" at that place. If so, state when and to whom such request was made.

(c) State whether libelant, or any one acting for libelant or the "Olympic II", ever obtained authority or approval from any United States Governmental authority to anchor the "Olympic II" at that place. If such authority or approval was ever obtained, state when and by whom it was given.

3. State whether there was a fog bell on board the "Olympic II" at the time of the collision. If

there was, give the following information in detail:

- (a) The type of bell;
- (b) The dimensions of the bell;
- (c) The material of which it was made;
- (d) The name of the manufacturer of the bell;
- (e) The location of the bell on the "Olympic II";
- (f) The method used to ring the bell; [46]
- (g) Whether the bell was rung prior to the collision, and if so, who rang it, and when and how frequently preceding the collision it was rung;
- (h) Under normal weather conditions, state the approximate maximum distance at which the bell could be heard, and explain in detail how you fixed that distance.

4. Were any other fog signals or warnings to approaching vessels given preceding the collision? If so, state what those signals or warnings were.

5. (a) How many persons were in the crew of the "Olympic II" at the time of the collision?

(b) Give the names and positions of each of the crew and state whether any of them were licensed by the United States Bureau of Marine Inspection and Navigation, and if so, what license was held by each person.

(c) State the sea experience of each person in the crew of the "Olympic II".

(d) State whether any of those in the crew of the "Olympic II" held a lifeboat certificate issued by the United States Bureau of Marine Inspection and Navigation, and if so, name those who held such certificates.

6. State in detail what each person in the crew of the "Olympic II" was engaged in within the period of five minutes preceding the collision, and include a description of where each person was stationed.

7. State the number of bulkheads in the "Olympic II" and describe where they were located.

8. Describe in detail all ballast, including water, rock gravel, cement and other ballast on the "Olympic II" at the time of collision, and give the total weight of all the ballast aboard. [47]

9. State for what purpose that amount of ballast was carried on the "Olympic II".

10. (a) State the number of lifeboats on board the "Olympic II" at the time of collision and the authorized passenger carrying capacity of the same.

(b) Where were they, or it, located?

(c) What were the launching facilities provided?

(d) In how many minutes time could each lifeboat normally be launched?

(e) How many persons were required to launch each lifeboat?

(f) When had each lifeboat last been launched prior to the date of collision?

11. (a) State whether it is true that the United States Bureau of Marine Inspection and Navigation ordered libellant to make various structural and equipmental changes on the "Olympic II" prior to the collision.

(b) If so, when were those changes ordered?

(c) List the structural and equipmental changes ordered.

(d) State whether any of the changes ordered were made prior to the collision and if so, list the changes made.

12. Was any member of the crew serving as lookout on the "Olympic II" at the time of and immediately prior to the collision? If so, state who was so serving, during what period of time he was so serving, where he was stationed and what were all of his duties at such time.

13. Itemize in detail the damage sustained by libelant alleged in the libel to have resulted from the loss of the "Olympic II". [48]

Dated: November 9, 1940.

LILLICK, GEARY, McHOSE
& ADAMS,
JOHN C. McHOSE,
JAMES L. ADAMS,
Proctors for Claimant-
Respondent.

[Endorsed]: Filed Nov. 12, 1940. [49]

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED LIBEL OF
HERMOSA AMUSEMENT CORPORATION,
LTD.

To the Honorable Judges of the United States District Court for the Southern District of California:

Nippon Yusen Kabushiki Kaisya, a corporation, as respondent herein and as claimant of the respondent Motor Vessel Sakito Maru, her motors, tackle, apparel, furniture, etc., in answer to the first amended libel of Hermosa Amusement Corporation, Ltd., admits, denies, and alleges as follows:

I

Admits that at all times mentioned in the first amended [50] libel the libelant was and now is a corporation organized and existing under the laws of the State of California. Alleges it has no information or belief sufficient to enable it to answer the remaining allegations of Article I of said first amended libel, and, basing its denial on that ground, denies each and every, all and singular, generally and specifically, such allegations.

II

Admits the allegations of Article II of said first amended libel.

III

Answering Article III of said first amended libel, admits that on September 4, 1940, at about 7:10 o'clock a.m., a collision occurred between the Sakito

Maru and the Olympic II in the Pacific Ocean approximately $3\frac{1}{4}$ nautical miles from the lighthouse on the west breakwater of Los Angeles Harbor, bearing $159\frac{1}{2}^{\circ}$ true from said lighthouse, and that the Olympic II was sunk. Denies each and every, all and singular, generally and specifically, the remaining allegations of Article III of said first amended libel, except as hereinafter expressly admitted or alleged, and in that connection repeats and realleges as though fully set forth herein all of the allegations of its answer to the libel of Hermosa Amusement Corporation, Ltd., on file herein, containing in Article 4 of said answer, from page 3, line 2, to any including page 7, line 11, thereof.

IV

Denies each and every, all and singular, generally and specifically, the allegations of Article IV of said first amended libel. Alleges in this respect that at all times mentioned in said first amended libel, the Sakito Maru was in all respects seaworthy and properly equipped and supplied, was manned by a competent [51] crew, was well and carefully navigated, was maintaining a proper and efficient lookout and was observing all the rules and regulations applicable to a vessel in her situation. Repeats and realleges as though fully set forth herein all of the allegations of its answer to the libel of Hermosa Amusement Corporation, Ltd. on file herein, contained in Article 5 of said answer, from page 7, line 18, to and including page 11, line 21, thereof.

V

Denies each and every, all and singular, generally and specifically, the allegations of Article V of said first amended libel. Denies that the libelant has suffered damage in the sum of \$75,000 or in any sum or at all.

VI

Denies that the premises are true, but admits that if true they are within the admiralty and maritime jurisdiction of the United States and this Court.

VII

Repeats and realleges as though fully set forth herein all of the allegations of Article 8 of its answer to the libel of Hermosa Amusement Corporation, Ltd., on file herein.

Wherefore, claimant and respondent prays that libelant take nothing by reason of its first amended libel, that said first amended libel be dismissed, and that claimant and respondent have and recover from libelant its costs of suit incurred herein, and for such other and further relief as may be just and meet in the premises.

LILLICK, GEARY, McHOSE

& ADAMS,

JAMES L. ADAMS,

REID R. BRIGGS,

Proctors for Respondent and

Claimant. [52]

(Duly verified.)

[Endorsed]: Filed Sep. 15, 1941. [53]

[Title of District Court and Cause.]

CROSS-LIBEL OF NIPPON YUSEN KABUSHIKI KAISYA, A CORPORATION.

To the Honorable, the Judges of the United States District Court for the Southern District of California, Central Division:

Nippon Yusen Kabushiki Kaisya, a corporation, respondent and claimant herein and owner of the Motor Vessel "Sakito Maru", her motors, tackle, apparel, furniture, etc., in a cause of collision, civil and maritime against Hermosa Amusement Corporation, [54] Ltd., a corporation, respectfully alleges as a cause of cross-libel as follows:

1) At all times herein mentioned, petitioner, Nippon Yusen Kabushiki Kaisya was and now is a corporation incorporated, organized and existing under and by virtue of the laws of the Empire of Japan and was and now is the owner and operator of the Motor Vessel "Sakito Maru", her motors, tackle, apparel, furniture, etc., and that said vessel was and now is registered under the laws of the Empire of Japan.

2) Upon information and belief, that at all times herein mentioned, cross-respondent, Hermosa Amusement Corporation, Ltd., was and now is a corporation duly organized and existing under and by virtue of the laws of California, having a place of business in the County of Los Angeles, Southern District of California.

3) Upon information and belief that at all times herein mentioned cross-respondent, Hermosa Amusement Corporation, Ltd., was the owner and operator of the fishing barge "Olympic II", formerly a schooner, built 63 years ago and recently converted into a pleasure fishing barge which was, at all times herein mentioned, operated by cross-respondent on the high seas of the Pacific Ocean off Los Angeles Harbor, California.

4) On or about September 4, 1940, at about the hour of 7:10 o'clock A. M., on the high seas of the Pacific Ocean, at a point about $3\frac{1}{2}$ miles Southeast of the lighthouse at the end of the west breakwater at the entrance to Los Angeles Harbor, a collision occurred between the "Sakito Maru" and the fishing barge "Olympic II". Upon information and belief that the facts and circumstances of said collision are as follows:

The fishing barge "Olympic II", a schooner built sixty-three years ago was recently converted into a pleasure fishing barge. [55] The "Olympic II" had an iron hull, was approximately two hundred thirty-eight (238) feet in length and thirty-eight (38) feet in width, with a depth of twenty-two (22) feet. Except for a bulkhead near the stem, said fishing barge had no other bulkheads, so that her lower hold was open from the bulkhead aforementioned to the stern. There were stowed in this open lower hold approximately fifteen hundred (1,500) tons of ballast, consisting of gravel, sand and heavy cement blocks.

At the time of the collision aforementioned, at

or about 7:10 o'clock A. M., on or about September 4, 1940, the "Olympic II", unknown to the master and officers of the "Sakito Maru", was anchored at a point about $3\frac{1}{2}$ nautical miles in a direction 162° true from the lighthouse at the end of the west breakwater at the entrance to Los Angeles Harbor, California, without permit or license from any Governmental body or agency, directly in the steamer lane for all vessels plying between Los Angeles Harbor and the Panama Canal and other points between Los Angeles Harbor and the Panama Canal. At the time of the collision there was no person aboard said fishing barge licensed by the United States Bureau of Marine Inspection and Navigation, either in the capacity of master, officer, able bodied seaman, or ordinary seaman. At said time there were aboard the "Olympic II" three employees of libelant, three employees in a concession or eating place aboard said fishing barge and eighteen people or passengers who had been transported to said fishing barge from the shore that morning aboard shore boats operated by libelant for the purpose of engaging in pleasure fishing.

The "Sakito Maru", at the time of the collision, was on a voyage from New York to Yokohama via the Panama Canal and Los Angeles Harbor. Until immediately prior to the collision and since noon, September 3, 1940, the "Sakito Maru" was steering a [56] course of 340° true. For several hours prior to the events in question on September 4, 1940, there had been on the bridge of the "Sakito Maru" in

charge of her navigation, the first officer, and in addition, an apprentice officer and a quartermaster, acting as helmsman. At about 7 o'clock A. M. of said day, S. Sato, master of the "Sakito Maru", came on the bridge and he and the other persons aforementioned remained on the bridge during the events hereinafter related and until and after the collision.

At 7 o'clock A. M., September 4, 1940, the "Sakito Maru" was proceeding on the course aforementioned, to-wit, 340° true, at a speed of about sixteen knots per hour, with her engines at full ahead. At this time the weather was clear with practically full visibility off the starboard and port sides of the vessel and to the stern but some distance ahead of the vessel there appeared to be a haze or mist. At about 7:03 o'clock A. M. the range of visibility ahead decreased to approximately one-half ($\frac{1}{2}$) a mile, and at this time the speed of the vessel was reduced to slow ahead, the sounding of regulation fog signals was commenced on the whistle and an A. B. sailor took the position of lookout at the bow of the vessel. Commencing with the time aforementioned fog signals were sounded by the apprentice officer of the "Sakito Maru" at approximately one minute intervals, each signal consisting of a single blast on the whistle of from about five (5) to six (6) seconds in duration, and these signals were continually sounded at the intervals and in the manner mentioned, until the time of the collision. During this period the master, chief officer and lookout

maintained a careful watchfulness and the helmsman remained at the wheel, as aforementioned.

At about 7:09 o'clock A. M., while the "Sakito Maru" was proceeding with her engines at slow ahead, on a course of 340° [57] true, as aforementioned, and while the master, first officer, an apprentice officer and a helmsman were on the bridge in the performance of their duties, as aforementioned, and a lookout was stationed at the bow of the vessel as aforementioned, the lookout at the bow sighted the "Olympic II" dead ahead of the "Sakito Maru" and lying at nearly right angles to her projected course and immediately notified the officers on the bridge of the presence of the fishing barge. Immediately thereafter the helm of the "Sakito Maru" was put hard to starboard, in an effort to change the course of the "Sakito Maru" so as to clear the stern of said fishing barge, the engines were stopped and put full astern and three blasts were sounded on the whistle.

Because of the distance required to change the heading of a vessel of the size and nature of the "Sakito Maru" the vessel had only commenced to swing or change her heading at the time of the impact. The collision occurred at about 7:10 o'clock A. M., the stem of the "Sakito Maru" striking the port side of the "Olympic II" nearly amidships. The impact checked the forward momentum of the "Sakito Maru", and since at that time the engines were turning full astern and the propellers were in reverse motion, the "Sakito Maru" was caused to

immediately gain a slight sternway and to separate from the barge. The engines were stopped at about the time of the impact but the time required to stop the propellers in their reverse motion was sufficient to permit the vessel to gain sternway and to cause her to separate from the barge immediately after the impact, as aforementioned.

Upon the "Sakito Maru" being separated from the fishing barge, the master of the "Sakito Maru" considered it would be an unwise and hazardous undertaking to attempt to move the vessel forward again in an effort to nose the bow into the hole stove in [58] the side of the barge, it being possible and probable that such a maneuver might have resulted in the "Sakito Maru" striking the barge in a different place or that her forward momentum could not be checked before the fishing barge might be pushed or caused to list, thus further endangering the lives and safety of those aboard. Accordingly, after the "Sakito Maru" had separated from the fishing barge and her engines were stopped, the engines were again put astern and the vessel backed a sufficient distance to give safe and proper clearance for dropping anchor. While the vessel was backing for this purpose, preparations were under way for dropping the anchor and for lowering a lifeboat. The engines of the "Sakito Maru", after this maneuver, were stopped at 7:15, the anchor was let go at 7:17, the engines were ordered slow ahead to check the sternway at 7:18, and the engines were then stopped again at 7:19. Immediately after

the engines were stopped at 7:19 and the vessel came to rest in the water, a lifeboat was lowered at 7:20 A. M.

In the meantime, the "Olympic II" sank and the lifeboat after being launched, was immediately directed to the area where the barge had sunk for the purpose of locating and rescuing any persons who might be found in the water. This search was continued by the lifeboat for two hours, during which time the "Sakito Maru" remained at anchor. Before the lifeboat returned to the "Sakito Maru" a Coast Guard cutter arrived at the scene and joined with other small boats in the vicinity to search for persons who might be found in the water. When this search was unavailing and no further assistance could be rendered by the "Sakito Maru", the vessel hoisted anchor at 11:57 A. M. and proceeded to the outer harbor of Los Angeles Harbor, where the vessel anchored until towed to shipyards for survey and temporary repairs.

At no time prior to the sighting of the "Olympic II" by the [59] lookout on the "Sakito Maru" were any bells, signals or other warnings from said fishing barge heard by anyone aboard the "Sakito Maru", nor were any bells, signals or other warnings from any other fishing barge or craft anchored in the vicinity of the fishing barge "Olympic II" heard by anyone aboard the "Sakito Maru".

5) At all times mentioned herein the "Sakito Maru" was in all respects seaworthy and properly equipped and supplied, was manned by a competent

crew, was well and carefully navigated, was maintaining a proper and efficient lookout and was observing all the rules and regulations applicable to a vessel in her situation.

6) The “Sakito Maru” committed no fault or negligence in the premises. Upon information and belief that the collision was solely due to and proximately caused by the carelessness and negligence of the “Olympic II” and cross-respondent Hermosa Amusement Corporation, Ltd., in the following respects:

A. The fishing barge “Olympic II” was negligently, recklessly and unnecessarily anchored at a point about 3½ miles outside the main entrance to Los Angeles-Long Beach Harbor, directly in the steamer lane of vessels approaching Los Angeles-Long Beach Harbor from the south so as to constitute a dangerous menace to navigation, particularly during foggy and misty weather as prevailed at the time of the collision, and so as to endanger the safety not only of the barge itself and all persons aboard, but the safety of all vessels approaching Los Angeles-Long Beach Harbor from the south in such regular steamer lane.

B. Despite the fact that said fishing barge constituted a dangerous menace to navigation for the reasons and in the manner aforementioned and that the libelant knew said fishing barge was anchored in said regular steamer lane, the libelant utterly failed and neglected to furnish any notice or to cause any notice to be [60] furnished to mariners or

masters of vessels of the location of said fishing barge.

C. The "Olympic II" did not have an adequate or proper fog bell, or other sound signalling device, and did not sound proper and regulation fog signals so as to provide a warning to the approaching "Sakito Maru".

D. The "Olympic II" was grossly undermanned and incompetently manned, there being no person aboard said fishing barge as an officer or member of the crew thereof, who held any license from the United States Bureau of Marine Inspection and Navigation, or who was experienced in navigation or who possessed any adequate or any knowledge of the rules for the prevention of collisions.

E. The "Olympic II" was in a grossly unseaworthy and unsafe condition in the following particulars, among others:

(a) Said fishing barge was entirely open and unprotected by collision bulkheads in her lower hold, from a point twenty (20) feet abaft her stem, for a distance of some two hundred eighteen (218) feet to her stern.

(b) There were stowed in said open and unprotected lower hold throughout the entire length of said fishing barge, fifteen hundred (1500) tons of ballast, consisting, among other things, of rock and gravel and heavy cement blocks.

(c) There was carried aboard said fishing barge, only one lifeboat, capable of accommodating only twenty persons, which was so affixed to said fishing

barge that it required a boom and a winch to raise and lower said lifeboat into the water, which operation would consume at least five minutes time.

F. Although approximately three months prior to the date of said collision the libellant, *Hermosa Amusement Corporation, Ltd.*, was ordered by the Bureau of Marine Inspection and Navigation to [61] make various structural and other changes to correct the unseaworthy and unsafe condition of said fishing barge, said libellant wholly failed and neglected to make any of said changes and wholly and utterly ignored the requirements of the Bureau of Marine Inspection and Navigation. The afore-said requirements of the Bureau of Marine Inspection and Navigation, with which said libellant failed to comply, included, among other things, the following:

(a) The structure comprising the keel, stem, stern-frame, keelsons, stringers, frames, beams, decks, bulkheads, ceilings, sheathings, planking, plating, fastenings, etc., including also the frames, beams, plating or planking of superstructures, deck houses, etc., and all holds, bilges, peaks and tanks, shall be thoroughly inspected and necessary tests shall be made to determine actual conditions and suitable repairs, renewals or replacements effected where found necessary.

(b) A sufficient number of transverse watertight bulkheads shall be fitted so that the vessel will remain afloat with positive stability in the event any one main compartment is flooded.

(c) The structural strength of the vessel shall be in all respects sufficient.

(d) All spars, rigging and gear shall be placed in a safe condition, or removed if unnecessary.

(e) An inclining test shall be made by a representative of the Bureau:

(f) All gangways, accommodation ladders and stairways, shall have suitable manropes on each side. All side gangways and ladders shall be of rugged construction. All running gear such as tackles, hooks, shackles, bridles, etc., shall be of suitable dimensions and in good condition. [62]

(g) There shall be one set of side lights suitably screened visible at least two miles.

(h) There shall be an efficient fog bell.

(i) There shall be one mechanical fog horn.

(j) There shall be a basket or other efficient signal for the purpose of indicating the side of the fishing vessel approaching vessels may pass.

(k) There shall be at least ten square feet of deck space available for each person allowed on board.

(l) A log book shall be kept in which a daily record of the number of persons on board during the day shall be entered.

(m) All bilges, holds, compartments, etc., shall be free of all rubbish, waste, oil, etc.

(n) Approved lifeboats with suitable launching arrangements and approved life rafts or buoyant apparatus, shall be carried sufficient to provide accommodations for all persons on board. Fifty per cent of such accommodations may be in lifeboats,

and fifty percent may be in life rafts or buoyant apparatus.

(o) There shall be floodlights on both sides of the vessel on vessels with persons on board other than crew during the night time.

(p) A sufficient complement of licensed officers and certificated seamen, including lifeboatmen, shall be carried as may be required to adequately deal with any emergency that may arise, and a licensed deck officer shall be in command of the vessel.

(q) The minimum crew while vessel is at anchor with persons other than crew on board shall be:

1 licensed master

1 licensed engineer

Sufficient certificated lifeboatmen to adequately launch and man all lifesaving [63] equipment, 65% of which shall be able seamen.

G. The persons aboard said fishing barge in the employ of libelant, Hermosa Amusement Corporation, Ltd., who were supposedly the crew thereof, were grossly incompetent, negligent and inattentive to their duties.

H. The "Olympic II" had no proper or sufficient, or any, lookout.

I. The "Olympic II", the persons aboard said fishing barge in the employ of the libelant, Hermosa Amusement Corporation, Ltd., and the libelant, Hermosa Amusement Corporation, Ltd., were negligent and at fault in other respects as to which claimant-respondent is not now advised, but as to which it begs leave to offer proof of, as and when advised, and to amend this answer accordingly.

7) As a result of said collision, the "Sakito Maru" sustained damage, the repair of which required the reasonable and necessary expenditure of an amount which cannot be ascertained at present but which is estimated at the sum of \$45,000, no part of which has been paid cross-libelant by cross-respondent. The temporary and permanent repair of the damage to the "Sakito Maru" necessarily made as a result of said collision occupied and required thirty (30) days for completion, during which period cross-libelant lost the entire use of said vessel and incurred various maintenance and detention expenses. Upon information and belief that the reasonable value for the use of the "Sakito Maru", including such maintenance and detention expenses, amounted to the sum of \$500.00 per day. That cross-libellant has been damaged in the sum of \$45,000.00 or thereabouts, on account of repairs as aforesaid, and the further sum of \$15,000.00, or thereabouts, on account of said loss of use of said vessel, including said maintenance and [64] detention expenses, totaling the sum of \$60,000.00, together with interest thereon from the time of such expenditures and such loss of use at the rate of 7% per annum.

8) That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, cross-libelant prays:

1) That process in due form of law according

to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against cross-respondent, and that cross-respondent may be cited to appear and answer on oath all and singular the matters aforesaid;

2) That this Honorable Court be pleased to decree payment to cross-libelant of the damages aforesaid with interest and costs.

3) That the libel herein filed by cross-respondent be stayed pursuant to the 50th Admiralty Rule until proper security shall have been given on behalf of cross-respondent in the present suit.

4) For such other and further relief as may be just and meet in the premises.

LILLICK, GEARY, McHOSE
& ADAMS,

JOHN C. McHOSE,

JAMES L. ADAMS,

Proctors for Claimant-
Respondent.

634 South Spring Street,
Los Angeles, California. [65]

(Duly verified.)

[Endorsed]: Filed Nov. 12, 1940. [66]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

The undersigned, Hermosa Amusement Corporation, Ltd., a California corporation, Libelant and cross-respondent in the above entitled cause, does hereby substitute Cluff & Bullard, 921 Garfield Building, Los Angeles, California, as its Proctors therein, in the place and stead of Lloyd S. Nix.

Dated this 6th day of December, 1940.

HERMOSA AMUSEMENT
CORPORATION, LTD.,
By J. M. ANDERSEN
Pres.

The undersigned, Lloyd S. Nix, does hereby consent to the above substitution.

LLOYD S. NIX

The undersigned, Cluff & Bullard, do hereby agree to the above substitution.

CLUFF & BULLARD
By ALFRED T. CLUFF

It is so ordered.

BEN HARRISON
Judge

Dated Dec. 13, 1940.

[Endorsed]: Filed Dec. 13, 1940. [68]

[Title of District Court and Cause.]

AMENDED PETITION TO BRING IN THIRD
PARTY RESPONDENTS UNDER ADMIR-
ALTY RULE 56.

To the Honorable, the Judges of the United States
District Court for the Southern District of
California, Central Division:

The amended petition of Nippon Yusen Kabushiki Kaisya (sued herein under the name of N Y K Lines and Nippon Yusen Kaisha Steamship Co., a corporation), owner of the Motor Vessel "Sakito Maru" and respondent and claimant herein, against Hermosa Amusement Corporation, Ltd., a corporation, J. M. Andersen, Doe One, Doe Two, Doe Three, Doe Four, Doe Five and Doe Six, in a cause of collision, civil and maritime, alleges as follows:

1. At all times hereinafter mentioned petitioner, Nippon Yusen Kabushiki Kaisya, was, and now is, a corporation, incorporated, [70] organized and existing under and by virtue of the laws of the Empire of Japan; at all of said times petitioner was, and now is, the owner and operator of the Motor Vessel "Sakito Maru", her motors, tackle, apparel, furniture, etc., and that said vessel was, and now is, registered under the laws of the Empire of Japan.

2. Upon information and belief that at all times hereinafter mentioned third party respondent Hermosa Amusement Corporation, Ltd., was, and now is, a corporation duly organized and existing under and by virtue of the laws of California and having a place

of business in the County of Los Angeles, Southern District of California. Upon information and belief that at all times hereinafter mentioned third party respondent J. M. Andersen was, and now is, a resident of the County of Los Angeles, Southern District of California.

3. Petitioner is ignorant of the true names or capacities, whether individual, associate, corporate, or otherwise, of the third party respondents, Doe One, Doe Two, Doe Three, Doe Four, Doe Five and Doe Six, and therefore names said third party respondents, and each of them, by such fictitious names, and prays that their true names and capacities, when ascertained, may be incorporated herein by appropriate amendments.

4. Upon information and belief that at all times hereinafter mentioned third party respondents were the owners and operators, and third party respondent J. M. Andersen was the master, of the Fishing Barge "Olympic II", formerly a schooner, built sixty-three (63) years ago, and recently converted into a pleasure fishing barge, which was operating on the high seas off Los Angeles Harbor, California; that on or about September 4, 1940, a libel was filed herein by Hermosa Amusement Corporation, Ltd., a corporation, against this petitioner and against the Motor Vessel "Sakito Maru" in a cause of damage, civil and maritime, alleging, among other things, on Septem- [71] ber 4, 1940, off Los Angeles Harbor, California, the "Sakito Maru" collided with and sank the Fishing Barge "Olympic II"; that on or about September 6,

1940, an intervening libel was filed by George W. Berger, covering labor for installation and certain radio broadcasting equipment; that on or about September 6, 1940, an intervening libel was filed by Norma Rubin, Lena Karsh, Florence, Lillian and Shirley Rose Karsh, by Lena Karsh, their mother and guardian ad litem, for the loss of their father Joseph Karsh, and certain personal property and effects; that on or about September 6, 1940, an intervening libel was filed by International Broadcasting Company, a corporation, covering the loss of one 5 killowatt radio broadcasting station; that on or about September 7, 1940, Elwood Johnson and Albertine K. Johnson filed an intervening libel, for the loss of their son Curtis Elwood Johnson; that on or about January 18, 1941, an intervening libel was filed by Lena Karsh, Administratrix of the Estate of Joseph Karsh, Deceased, in behalf of herself as widow and the children of herself and Joseph Karsh, for the loss of said Joseph Karsh and for his funeral and burial expenses, alleged to have been occasioned by the collision alleged in said petition; that an intervening libel was filed on or about December 17, 1940, by John Gilbert Montgomery, by his guardian ad litem, Margerie L. Montgomery, for personal injuries and damage to and loss of clothing and fishing equipment, alleged to have been occasioned by the collision alleged in said petition; and that on or about February 6, 1941, an amended libel in intervention was filed by Grace E. Mayo and Frank F. Mayo, individually and as administrators of the

estate of Roy A. Mayo, Deceased, for the death of said Roy A. Mayo.

5. Petitioner alleges upon information and belief that the facts and circumstances of said collision are as follows:

The fishing barge "Olympic II", a schooner built sixty-three years ago, was recently converted into a pleasure fishing barge. [72] The "Olympic II" had an iron hull, was approximately two hundred thirty eight (238) feet in length and thirty-eight (38) feet in width, with a depth of twenty-two (22) feet. Except for a bulkhead near the stem, said fishing barge had no other bulkheads, so that her lower hold was open from the bulkhead aforementioned to the stern. There were stowed in this open lower hold approximately fifteen hundred (1500) tons of ballast, consisting of gravel, sand and heavy cement blocks.

At the time of the collision aforementioned, at or about 7:10 o'clock a. m., on or about September 4, 1940, the "Olympic II", unknown to the master and officers of the "Sakito Maru", was anchored at a point about $31\frac{1}{2}$ nautical miles in a direction 162° true from the lighthouse at the end of the west breakwater at the entrance to Los Angeles Harbor, California, without permit or license from any Governmental body or agency, directly in the steamer lane for all vessels plying between Los Angeles Harbor and the Panama Canal and other ports between Los Angeles Harbor and the Panama Canal. At the time of the collision there was no person aboard said fishing barge licensed by the United States Bureau of

Marine Inspection and Navigation, either in the capacity of master, officer, able bodied seaman, or ordinary seaman. At said time there were aboard the "Olympic II", three employees of libelant, three employees in a concession or eating place aboard said fishing barge and eighteen people or passengers who had been transported to said fishing barge from the shore that morning aboard shore boats operated by libelant for the purpose of engaging in pleasure fishing.

The "Sakito Maru", at the time of the collision, was on a voyage from New York to Yokohama via the Panama Canal and Los Angeles Harbor. Until immediately prior to the collision and since noon, September 3, 1940, the "Sakito Maru" was steering a course of 340° true. For several hours prior to the events in question on September 4, 1940, [73] there had been on the bridge of the "Sakito Maru", in charge of her navigation, the first officer, and in addition, an apprentice officer and a quartermaster, acting as helmsman. At about 7 o'clock of said day, S. Sato, master of the "Sakito Maru", came on the bridge and he and the other persons aforementioned remained on the bridge during the events hereinafter related and until and after the collision.

At 7 o'clock a. m., September 4, 1940, the "Sakito Maru" was proceeding on the course aforementioned, to-wit, 340° true, at a speed of about sixteen knots, with her engines at full ahead. At this time the weather was clear with practically full visibility off the starboard and port sides of the vessel and to the

stern but some distance ahead of the vessel there appeared to be a haze or mist. At about 7:03 o'clock a. m. the range of visibility ahead decreased to approximately one-half ($1\frac{1}{2}$) a mile, and at this time the speed of the vessel was reduced to slow ahead, the sounding of regulation fog signals was commenced on the whistle and an A. B. sailor took the position of lookout at the bow of the vessel. Commencing with the time aforementioned fog signals were sounded by the apprentice officer of the "Sakito Maru" at approximately one minute intervals, each signal consisting of a single blast on the whistle of from about five (5) to six (6) seconds in duration, and these signals were continually sounded at the intervals and in the manner mentioned, until the time of the collision. During this period the master, chief officer and lookout maintained a careful watchfulness and the helmsman remained at the wheel as aforementioned.

At about 7:09 o'clock a. m., while the "Sakito Maru" was proceeding with her engines at slow ahead, on a course of 340° true, as aforementioned, and while the master, first officer, an apprentice officer and a helmsman were on the bridge in the performance of their duties, as aforementioned, and a lookout was stationed at [74] the bow of the vessel as aforementioned, the lookout at the bow sighted the "Olympic II" dead ahead of the "Sakito Maru" and lying at nearly right angles to her projected course and immediately notified the officers on the bridge of the presence of the fishing barge. Immedi-

ately thereafter the helm of the "Sakito Maru" was put hard to starboard, in an effort to change the course of the "Sakito Maru" so as to clear the stern of said fishing barge, the engines were stopped and put full astern and three blasts were sounded on the whistle.

Because of the distance required to change the heading of a vessel of the size and nature of the "Sakito Maru" the vessel had only commenced to swing or change her heading at the time of the impact. The collision occurred at about 7:10 o'clock a. m., the stem of the "Sakito Maru" striking the port side of the "Olympic II" nearly amidships. The impact checked the forward momentum of the "Sakito Maru", and since at that time the engines were turning full astern and the propellers were in reverse motion, the "Sakito Maru" was caused to immediately gain a slight sternway and to separate from the barge. The engines were stopped at about the time of the impact but the time required to stop the propellers in their reverse motion was sufficient to permit the vessel to gain sternway and to cause her to separate from the barge immediately after the impact, as aforementioned.

Upon the "Sakito Maru" being separated from the fishing barge, the master of the "Sakito Maru" considered it would be an unwise and a hazardous undertaking to attempt to move the vessel forward again in an effort to nose the bow into the hole stove in the side of the barge, it being possible and probable that such a maneuver might have resulted in the

“Sakito Maru” striking the barge in a different place or that her forward momentum could not [75] be checked before the fishing barge might be pushed or caused to list, thus further endangering the lives and safety of those aboard. Accordingly, after the “Sakito Maru” had separated from the fishing barge and her engines were stopped, the engines were again put astern and the vessel backed a sufficient distance to give safe and proper clearance for dropping anchor. While the vessel was backing for this purpose, preparations were under way for dropping the anchor and for lowering a lifeboat. The engines of the “Sakito Maru”, after this maneuver, were stopped at 7:15, the anchor was let go at 7:17, the engines were ordered slow ahead to check the sternway at 7:18, and the engines were then stopped again at 7:19. Immediately after the engines were stopped at 7:19 and the vessel came to rest in the water, a lifeboat was lowered at 7:20 a. m.

In the meantime, the “Olympic II” sank and the lifeboat after being launched, was immediately directed to the area where the barge had sunk for the purpose of locating and rescuing any persons who might be found in the water. This search was continued by the lifeboat for two hours, during which time the “Sakito Maru” remained at anchor. Before the lifeboat returned to the “Sakito Maru” a Coast Guard cutter arrived at the scene and joined with other small boats in the vicinity to search for persons who might be found in the water. When this search was unavailing and no further assistance could

be rendered by the "Sakito Maru", the vessel hoisted anchor at 11:57 a. m. and proceeded to the outer harbor of Los Angeles Harbor, where the vessel anchored until towed to shipyards for survey and temporary repairs.

At no time prior to the sighting of the "Olympic II" by the lookout on the "Sakito Maru" were any bells, signals or other warnings from said fishing barge heard by anyone aboard the "Sakito Maru", nor were any bells, signals or other warnings from any other [76] fishing barge or craft anchored in the vicinity of the fishing barge "Olympic II" heard by anyone aboard the "Sakito Maru".

6. The "Sakito Maru" committed no fault or negligence in the premises and upon information and belief the said collision was solely due to and proximately caused by the carelessness and negligence of the fishing barge "Olympic II" and third party respondents in the following respects:

A. The fishing barge "Olympic II" was negligently, recklessly and unnecessarily anchored at a point about $3\frac{1}{2}$ miles outside the main entrance to Los Angeles-Long Beach Harbor, directly in the steamer lane of vessels approaching Los Angeles-Long Beach Harbor from the south so as to constitute a dangerous menace to navigation, particularly during foggy and misty weather as prevailed at the time of the collision, and so as to endanger the safety not only of the barge itself and all persons aboard, but the safety of all vessels approaching Los Angeles-Long Beach Harbor from the south in such regular steamer lane.

B. Despite the fact that said fishing barge constituted a dangerous menace to navigation for the reasons and in the manner aforementioned and that the third party respondents knew said fishing barge was anchored in said regular steamer lane, the third party respondents utterly failed and neglected to furnish any notice or to cause any notice to be furnished to mariners or masters of vessels of the location of said fishing barge.

C. The "Olympic II" did not have an adequate or proper fog bell, or other sound signalling device, and did not sound proper and regulation fog signals so as to provide a warning to the approaching "Sakito Maru."

D. The "Olympic II" was grossly undermanned and incompetently manned, there being no person aboard said fishing barge [77] as an officer or a member of the crew thereof, who held any license from the United States Bureau of Marine Inspection and Navigation, or who was experienced in navigation or who possessed an adequate or any knowledge of the rules for the prevention of collisions.

E. The "Olympic II" was in a grossly unseaworthy and unsafe condition in the following particulars, among others:

(a) Said fishing barge was entirely open and unprotected by collision bulkheads in her lower hold, from a point twenty (20) feet abaft her stem, for a distance of some two hundred eighteen (218) feet to her stern.

(b) There were stowed in said open and unpro-

tected lower hold throughout the entire length of said fishing barge, fifteen hundred (1500) tons of ballast, consisting, among other things, of rock and gravel and heavy cement blocks.

(c) There was carried aboard said fishing barge only one lifeboat, capable of accommodating only twenty persons, which was so affixed to said fishing barge that it required a boom and a winch to raise and lower said lifeboat into the water, which operation would consume at least five minutes time.

F. Although approximately three months prior to the date of said collision third party respondents were ordered by the United States Bureau of Marine Inspection and Navigation to make various structural and other changes to correct the unseaworthy and unsafe condition of said fishing barge, third party respondents wholly failed and neglected to make any of said changes and wholly and utterly ignored the requirements of the Bureau of Marine Inspection and Navigation. The aforesaid requirements of the Bureau of Marine Inspection and Navigation, included, among other things, the following:

(a) The structure comprising the keel, [78] stem, sternframe, keelsons, stringers, frames, beams, decks, bulkheads, ceilings, sheathings, planking, plating, fastenings, etc., including also the frames, beams, plating or planking of superstructures, deck houses, etc., and all holds, bilges, peaks and tanks, shall be thoroughly inspected and necessary tests shall be made to determine actual conditions and suitable repairs, renewals or replacements effected where found necessary.

(b) A sufficient number of transverse watertight bulkheads shall be fitted so that the vessel will remain afloat with positive stability in the event any one main compartment is flooded.

(c) The structural strength of the vessel shall be in all respects sufficient.

(d) All spars, rigging and gear shall be placed in a safe condition, or removed if unnecessary.

(e) An inclining test shall be made by a representative of the Bureau.

(f) All gangways, accommodation ladders and stairways, shall have suitable manropes on each side. All side gangways and ladders shall be of rugged construction. All running gear such as tackles, hooks, shackles, bridles, etc., shall be of suitable dimensions and in good condition.

(g) There shall be one set of side lights suitably screened visible at least two miles.

(h) There shall be an efficient fog bell.

(i) There shall be one mechanical fog horn.

(j) There shall be a basket or other efficient signal for the purpose of indicating the side of the fishing vessel approaching vessels may pass.

(k) There shall be at least ten square [79] feet of deck space available for each person allowed on board.

(l) A log book shall be kept in which a daily record of the number of persons on board during the day shall be entered.

(m) All bilges, holds, compartments, etc., shall be free of all rubbish, waste, oil, etc.

(n) Approved lifeboats with suitable launching arrangements and approved life rafts or buoyant apparatus, shall be carried sufficient to provide accommodations for all persons on board. Fifty percent of such accommodations may be in lifeboats, and fifty percent may be in life rafts or buoyant apparatus.

(o) There shall be floodlights on both sides of the vessel on vessels with persons on board other than crew during the night time.

(p) A sufficient complement of licensed officers and certificated seamen, including lifeboatmen, shall be carried as may be required to adequately deal with any emergency that may arise, and a licensed deck officer shall be in command of the vessel.

(q) The minimum crew while vessel is at anchor with persons other than crew on board shall be:

1 licensed master

1 licensed engineer

Sufficient certificated lifeboatmen to adequately launch and man all life-saving equipment, 65% of which shall be able seamen.

G. The persons aboard said fishing barge in the employ of third party respondent, Hermosa Amusement Corporation, Ltd., who were supposedly the crew thereof, were grossly incompetent, negligent and inattentive to their duties. [80]

H. The "Olympic II" had no proper or sufficient, or any, lookout.

I. The "Olympic II" and third party respondents were negligent and at fault in other respects as

to which petitioner is not now advised, but as to which it begs leave to offer proof, as and when advised, and to amend this petition accordingly.

7. As a result of said collision the "Sakito Maru" sustained damage, the repair of which required the reasonable and necessary expenditure of an amount which cannot be ascertained at present but which is estimated at the sum of \$45,000.00, no part of which has been paid petitioner. The temporary and permanent repair of the damage to the "Sakito Maru" necessarily made as a result of said collision occupied and required thirty (30) days for completion, during which period petitioner lost the entire use of said vessel and incurred various maintenance and detention expenses. Upon information and belief that the reasonable value for the use of the "Sakito Maru", including such maintenance and detention expenses, amounted to the sum of \$500.00 per day. That petitioner has been damaged in the sum of \$45,000.00, or thereabouts, on account of repairs as aforesaid, and the further sum of \$15,000.00, or thereabouts, on account of said loss of use of said vessel, including said maintenance and detention expenses, totaling the sum of \$60,000.00, together with interest thereon from the time of such expenditures and such loss of use at the rate of 7% per annum.

8. Petitioner has filed herein its cross-libel against libelant and cross-respondent Hermosa Amusement Corporation, Ltd., demanding payment of the damages aforesaid with interest and costs.

9. Upon information and belief that any liability

herein by reason of the matters alleged in the libel and in the intervening libels was caused by the fault and negligence of third [81] party respondents as hereinabove alleged and third party respondents are wholly or at least partly liable to libelant and to intervening libelants and should therefore be parties herein and proceeded against directly in this court by libelant and by intervening libelants.

10. Upon information and belief that third party respondents are also wholly or at least partly liable to petitioner for the damage sustained by the "Sakito Maru" and by petitioner as owner thereof, as hereinabove alleged and should therefore be parties herein and proceeded against together with libelant and cross-respondent in the cross-libel proceedings filed herein by petitioner.

11. Petitioner has filed herein the customary stipulation for petitioner's costs as required by the rules and practice of this court.

12. Petitioner has filed its answer herein and has obtained the consent of the court to the filing of this petition.

13. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, petitioner prays:

1. That a citation in due form of law may issue against third party respondents herein, citing them, and each of them, to appear and answer all and singular the matters set forth in this petition and in the libel and intervening libels and in the cross-libel

herein and that third party respondents may be proceeded against as if originally made parties herein and that if said third party respondents cannot be found in this district their [82] goods and chattels within this district may be attached to the amount sued for in the libel and intervening libels herein;

2. That this Honorable Court be pleased to decree that if libelant or any intervening libelant is entitled to a decree then that said decree be entered against third party respondents herein;

3. That this Honorable Court be pleased to decree payment to petitioner of the damages sustained by petitioner aforesaid with interest and costs;

4. That the libel and intervening libels be dismissed as against petitioner with costs;

5. That petitioner have such other and further relief in the premises as to the Court may seem just.

LILLICK, GEARY, McHOSE &
ADAMS

JOHN C. McHOSE

JAMES L. ADAMS

Proctors for Petitioner

634 South Spring Street,
Los Angeles, California.

TRinity 3411. [83]

(Duly verified.) [84]

STIPULATION

It Is Hereby Stipulated, by and between the respective undersigned proctors for Hermosa Amusement Corporation, Ltd., and J. M. Andersen, and Nippon Yusen Kabushiki Kaisya, that the foregoing Amended Petition to Bring in Third Party Respondents under Admiralty Rule 56 may be filed.

Dated: May 13, 1941.

ALFRED T. CLUFF
HUGH B. ROTCHFORD
GEORGE H. MOORE
CLUFF & BULLARD

Proctors for Hermosa Amusement Corporation, Ltd., and
J. M. Andersen.

LILLICK, GEARY, McHOSE
& ADAMS

JOHN C. McHOSE
JAMES L. ADAMS

Proctors for Nippon Yusen
Kabushiki Kaisya.

ORDER

Good cause appearing therefor,

It Is Ordered that petitioner may file the above amended petition, impleading third party respondents above-named under the 56th Admiralty Rule of the Supreme Court.

Dated: May 13, 1941.

BEN HARRISON

United States District Judge

[Endorsed]: Filed May 13, 1941 [85]

[Title of District Court and Cause.]

LIBELANT'S ANSWERS TO INTERROGA-
TORIES ATTACHED TO ANSWER OF
CLAIMANT AND RESPONDENT, NIPPON
YUSEN KABUSHIKI KAISYA

1. Approximately $3\frac{1}{4}$ nautical miles southwest of Los Angeles breakwater light, bearing approximately 162° true from said light.

2. (a) No written or formal notice was ever given. Sometime in April 1940, Captain Andersen asked Inspectors Sullivan and Moody of the Bureau if there was any objection to the "Olympic II" anchoring at Horseshoe Kelp and was informed that there was none.

(b) No request was made by the libelant.

(c) See (a) above. [87]

3. Yes.

(a) Regular ship's bell.

(b) About 14 inches in diameter.

(c) Bell metal or bronze.

(d) Do not know.

(e) On a bracket attached to the forward end of the house, amidships.

(f) A lanyard and rope were attached to the clapper. The operator sounded the bell by pulling on the rope or lanyard, causing the clapper to strike the bell.

(g) Yes. The bell was rung by the watchman, L. R. Ohiser, from 4:30 A. M. until the collision, except when weather conditions did not require it. From 7:00 o'clock A. M. the bell was rung steadily

at minute intervals until the "Sakito Maru" came in sight, and thereafter was rung continuously until a few seconds before the collision.

(h) No tests were made to determine the maximum distance the bell could be heard. When the vessel was lying at Redondo it was observed that the bell could be heard clearly at a distance of one-half mile or thereabouts.

4. The bell was rung as stated in answer to Interrogatory 3-(g).

5. (a) Four persons, excluding the concessionaire and members of his staff, none of whom were employees of the libelant and none of whom had any duties pertaining to the barge.

(b) J. M. Andersen, master; master's license. L. R. Ohiser, watchman; ordinary seaman's papers. Jack Greenwood, barge keeper and deckhand. Joe Culp, bait boy and deckhand. The libelant does not know if the two latter had licenses or seamen's papers.

(c) J. M. Andersen, master. 42 years sea experience. Master since 1920. [88]

L. R. Ohiser. Ordinary seaman's experience on coastwise and offshore vessels.

Jack Greenwood. Employed by libelant about eight months prior to accident. Libelant does not know of any other sea experience.

Joe Culp. Employed by Libelant about two months prior to accident. Libelant has no information as to prior sea experience, if any.

(d) As far as the libelant knows, none of the

three members of the crew had lifeboat certificates.

6. J. M. Andersen, the master, was ashore. L. R. Ohiser, the watchman, was on deck at the bell, ringing the bell and acting as lookout. Greenwood and Culp were about the decks, attending to the passengers.

7. One thwartships bulkhead, about 20 feet aft of the stem.

8. Approximately 1500 tons of sand, gravel and cement blocks.

9. Give the vessel stability and bring her to a proper freeboard.

10. (a) One lifeboat, twenty passengers.

(b) On the house, amidships.

(c) Swinging boom and winch, approved by the Bureau of Inspection and Navigation.

(d) About five minutes.

(e) Two.

(f) April 1940.

11. No.

12. Yes. L. R. Ohiser. At all times after 6:00 o'clock A. M., Ohiser had no duties but to ring the bell and act as lookout. He was stationed at the bell. During the night he was [89] watchman, in general charge of the ship. His duties were to watch out for fires, for unauthorized persons coming aboard, to act as anchor watch, and in foggy weather to ring the bell.

13. Total loss of the "Olympic II", her tackle, apparel, furniture and equipment, \$75,000.00. There was no salvage whatsoever, except the lifeboat, two

anchors and a quantity of chain, and 82 life preservers, which, less the cost of salvage, was of the value of approximately \$412.40.

ALFRED T. CLUFF
HUGH B. ROTCHFORD
GEORGE H. MOORE
CLUFF & BULLARD

Proctors for Libelant. [90]

(Duly verified.)

[Endorsed]: Filed Jul 31, 1941 [91]

[Title of District Court and Cause.]

ANSWER OF HERMOSA AMUSEMENT CORPORATION, LTD. (LIBELANT HEREIN) AND J. M. ANDERSEN TO AMENDED PETITION OF NIPPON YUSEN KABUSHIKI KAISYA TO BRING IN THIRD PARTY RESPONDENTS.

To the Honorable, the Judges of the United States District Court, for the Southern District of California:

The answer of Hermosa Amusement Corporation, Ltd., libelant herein, and J. M. Andersen, third party respondents, to the amended petition of Nippon Yusen Kabushiki Kaisya, a corporation, to bring in third party respondents, admits, denies and alleges as follows:

I.

Admits the allegations of Articles 1 and 2 of the amended petition. [92]

II.

Answering the allegations of Article 4 of the amended petition, admits and alleges that the libellant, Hermosa Amusement Corporation, Ltd., at all the times mentioned was the sole owner and operator of the fishing barge "Olympic II"; that J. M. Andersen was her master; denies that any other person was the owner and operator thereof; admits that on or about September 4, 1940 a libel was filed in this cause by Hermosa Amusement Corporation, Ltd., which ever since has been and now is a party to the above entitled suit; admits that intervening libels against the "Sakito Maru" and the petitioner were filed in the said action by the persons, at or about the dates and for the purposes set forth in Article 4 of the amended petition.

III.

Answering the allegations of Articles 5 and 6 of the amended petition, these third party respondents hereby refer to and incorporate herein the allegations of Articles III and IV of the first amended libel of Hermosa Amusement Corporation, Ltd. and Article IV of the answer of Hermosa Amusement Corporation, Ltd. to the cross-libel of the petitioner herein. These third party respondents deny each and every allegation of Articles 5 and 6 of the amended petition, except as admitted and alleged in the articles of the said first amended libel and the said answer to the cross-libel above incorporated herein by reference; and allege that the true facts and circumstances of the collision and the causes

thereof are as set forth in said Articles III and IV of the said first amended libel.

IV.

Answering Article 7 of the amended petition, these third party respondents refer to and make a part hereof, with like force and effect as if set forth herein at length, the allegation [93] of Article V of the answer of Hermosa Amusement Corporation, Ltd. to the said cross-libel of the petitioner.

V.

Admits the allegations of Article 8 of the amended petition.

VI.

Denies each and every allegation of Articles 9 and 10 of the amended petition.

VII.

Denies that the premises of the petition are true, except as herein admitted or alleged.

Further answering the amended petition, and for a first separate and affirmative defense thereto, the third party respondent, Hermosa Amusement Corporation, Ltd., alleges:

I.

Said third party respondent hereby refers to all the allegations of its first separate and affirmative defense in its answer to the cross-libel of the petitioner herein, and incorporates said allegations in this answer with like effect as if set forth herein at length.

II.

The amounts claimed by the petitioner and the intervening libelants referred to in Article 4 of the amended petition, exceed the value of the "Olympic II", her tackle, apparel and furniture and freight then pending at the termination of the said adventure and the interest of this third party respondent therein, and this third party respondent claims the benefit of limitation of liability as by the Acts of Congress of the United States provided, and claims to be entitled to limit its liability, if any, to the amount or value of its interest aforesaid in the "Olympic [94] II" and her freight then pending at the time of the termination of the said adventure, as aforesaid.

Wherefore, the Hermosa Amusement Corporation, Ltd. and J. M. Andersen, third party respondents, pray that the amended petition may be dismissed; that these answering third party respondents recover their costs herein; and for such other and further relief as may be meet and proper in the premises.

ALFRED T. CLUFF
HUGH B. ROTCHFORD
GEORGE H. MOORE
CLUFF & BULLARD

Proctors for Third Party Respondents, Hermosa Amusement Corporation, Ltd. and J. M. Andersen. [95]

(Duly verified.)

[Endorsed]: Filed Jul. 31, 1941. [96]

[Title of District Court and Cause.]

ANSWER OF HERMOSA AMUSEMENT CORPORATION, LTD. TO CROSS-LIBEL OF NIPPON YUSEN KABUSHIKI KAISYA.

To the Honorable, the Judges of the United States District Court, for the Southern District of California :

The answer of Hermosa Amusement Corporation, Ltd., libellant and cross-respondent, to the cross-libel of Nippon Yusen Kabushiki Kaisya, admits, denies and alleges as follows:

I.

Admits the allegations of Articles 1, 2 and 3 of the cross-libel, except that the cross-respondent denies that the fishing barge "Olympic II" was formerly a schooner, and alleges, she formerly was a three-masted ship. [97]

II.

Admits that at the time and approximately the place described in Article 4 of the cross-libel, a collision occurred between the "Sakito Maru" and the "Olympic II"; alleges that the recital of the facts and circumstances of the collision in Article 4 of the cross-libel is in large part untrue and falsely alleged; that in respect to many of such allegations the cross-respondent has no knowledge or information so as to enable it to admit or deny the same or allege the true facts, and the cross-defendant therefore denies each and all of the allegations in said

Article 4 contained. The cross-respondent alleges that the true facts and circumstances of the said collision are as set forth in Article III of its first amended libel, as libelant herein, and hereby refers to the allegations of said Article III of the first amended libel and incorporates the same herein with like effect as if set forth herein at length.

III.

Answering Article 5 of the cross-libel, the cross-respondent denies that at the times mentioned in the cross-libel the "Sakito Maru" was manned by a competent crew or was well or properly navigated, or was maintaining a proper or efficient lookout or was observing all or any of the rules and regulations applicable to a vessel in her situation. Respecting the seaworthiness, equipment and supply of the "Sakito Maru", except in the respects herein specifically denied, the cross-respondent has no knowledge or information, and therefore denies the same and demands strict proof as to the seaworthiness, proper equipment and supply of the "Sakito Maru", if material.

IV.

Answering the allegations of Article 6 of the cross-libel, the cross-respondent denies that the "Sakito Maru" com- [98] mitted no fault or negligence in the premises of the cross-libel; denies that the cross-respondent or the "Olympic II", or her master or crew, were negligent in any of the respects set forth in said Article 6, or that the collision was

solely or at all due to or proximately caused by carelessness or negligence of the "Olympic II" or her crew or the cross-respondent in any of the respects alleged in the cross-libel or otherwise.

A.

Denies, generally and specifically, each and every allegation of Article 6-A of the cross-libel, and in this connection alleges that the place of anchorage of the "Olympic II" was a well-known fishing ground, well to the westward of the track or steamer lane of vessels approaching Los Angeles Harbor from the south, at which place it was and had been for years customary for vessels to anchor and fish, permanently or from day to day, all of which was or should have been known to the master and officers of the "Sakito Maru".

B.

Admits that the cross-respondent gave no formal or written notice by publication or posting of the place of anchorage of the "Olympic II", and in this connection alleges that the fact that several fishing barges were permanently anchored at said Horseshoe Kelp during the fishing season and that numerous other vessels habitually anchored there to fish from day to day was a matter of common knowledge to navigators of vessels in said waters and had been for several years prior to the collision.

C.

Denies each and every allegation of Article 6-C

of the cross-libel, and in this connection alleges that the "Olympic II" was at all times provided with a proper and adequate bell, and sounded the same as required by law at all appropriate times [99] prior to the collision, and that as the "Sakito Maru" came in sight, the bell was rung loudly and continuously until a collision was imminent.

D.

Denies, generally and specifically, each and every allegation of Article 6-D of the cross-libel, except that the cross-respondent admits that the master of the "Olympic II" was ashore at the time of the collision, and that no person licensed as a marine officer by the United States Bureau of Marine Inspection and Navigation was on board at the time of the collision;

E.

Denies that the "Olympic II" was in an unseaworthy or unsafe condition in any of the respects set forth in Article 6-E of the cross-libel or otherwise;

(a) Denies that the "Olympic II" was entirely open and unprotected by collision bulkheads; alleges that her hull, decks and collision bulkhead, situated about 20 feet aft of her stem, were tight, staunch and strong in all respects; admits that there were no bulkheads in the lower hold of the "Olympic II" other than an athwartships collision bulkhead about 20 feet aft of her stem;

(b) Denies that the hold of the "Olympic II"

was open or unprotected; admits that 1500 tons of ballast, consisting of rock, gravel and cement blocks were stowed in said lower hold, and alleges that said 1500 tons of ballast constituted approximately one-half the said vessel's deadweight carrying capacity;

(c) Admits that there was carried on board said fishing barge one lifeboat, capable of accommodating 20 persons, which required the operation of a boom and hand winch to lower into the water; admits that the launching of said lifeboat with said boom and winch would occupy approximately five minutes, and [100] in this connection alleges that the lifeboat and launching device were approved by the United States Bureau of Marine Inspection and Navigation.

F.

Denies each and every allegation of Article 6-F of the cross-libel, and in this connection alleges that on or about June 3, 1940 the Bureau of Marine Inspection and Navigation notified the operators of fishing and other pleasure barges, including the cross-respondent, that the said bureau would thereafter consider such barges subject to inspection, and with said notice enclosed a list of general "minimum requirements" consisting of 42 items, including those set forth in Article 6-F of the cross-libel. Said bureau, however, did not require compliance with said minimum requirements by the "Olympic II" or any other fishing or pleasure barge during the season of 1940, and on March 21, 1941, in a

memorandum to the Secretary of Commerce respecting the loss of the "Olympic II", R. S. Field, Director of the Bureau of Marine Inspection and Navigation, stated as follows:

"For some time doubt had existed among officials of the Bureau and of the Department as to the right of the Bureau to inspect anchored barges of a type similar to the 'Olympic' and engaged in a similar business.

Officials of the Bureau and of the Department, therefore, met in conference, and it was decided that such vessels were subject to the inspectional jurisdiction of the Bureau. Thereafter the Bureau issued instructions covering the inspection of these vessels, and the owners were notified accordingly. [101]

It was not deemed equitable, however, to require that the vessels immediately comply with the rigid requirements of inspection, and, therefore, the owners were given a reasonable length of time in which to comply with the requirements placed upon them. This was true in the case of the 'Olympic II'."

G.

Denies, generally and specifically, each and every allegation of Article 6-G of the cross-libel, and in this connection alleges that from the time of the collision until the "Olympic II" sank, each of the three members of the "Olympic II's" crew diligently and heroically devoted themselves to equip-

ping the persons on the "Olympic II" with life preservers, and in putting them onto the shore boat and water taxi alongside; whereby the lives of many persons were saved, and because of their exclusive devotion to such activity two of said crew members lost their lives.

H.

Denies that the "Olympic II" had no proper or sufficient or any lookout, and in this connection alleges that at all times prior to the collision the "Olympic II" had on duty a competent watchman and lookout, properly stationed and attentive to his duties.

I.

Denies, generally and specifically, each and every allegation of Article 6-I of the cross-libel.

V.

Admits that as a result of the collision the "Sakito Maru" sustained damage, the extent and amount of which, the re- [102] pairs required therefor, and the time consumed by said repairs are unknown to the cross-respondent. The cross-respondent has no knowledge or information as to the length of time, if any, required for temporary or permanent repair of the damage to the "Sakito Maru", the cost thereof, the time consumed therein, the value, if any, of the use of said vessel, or the maintenance or detention expenses, if any, incurred during any repair period. The cross-respondent therefore denies each and every allegation of Article 7

of the cross-libel, and demands strict proof thereof from the cross-libelant, if material.

VI.

Denies that the premises of the cross-libel are true, except as herein admitted, but admits the admiralty and maritime jurisdiction of this Honorable Court.

Further answering the cross-libel, and for a first separate and affirmative defense thereto, the cross-respondent alleges:

I.

At all the times herein mentioned the cross-respondent was the sole owner and operator of the fishing barge "Olympic II".

II.

On or about September 4, 1940 the "Olympic II", anchored in the waters of the Pacific Ocean at approximately the place in the foregoing answer alleged, and being then and there in every respect seaworthy and properly and efficiently manned, supplied and equipped, and furnished with suitable tackle, apparel and furniture, all in good order and condition, sufficient and efficient for the business and adventure in which she was engaged, took on board approximately eighteen patrons to use her [103] facilities for the purpose of fishing. The cross-respondent had exercised due diligence to make and maintain the "Olympic II", her tackle, apparel, furniture and personnel seaworthy, sufficient and efficient in all the respects necessary for the adventure in which said vessel was engaged.

III.

Following the collision between the “Olympic II” and the “Sakito Maru”, described in the foregoing answer, the “Olympic II” sank at the place of said collision and terminated her adventure at about 7:15 o’clock A. M. on September 4, 1940.

IV.

The said collision, and all loss or damage consequent thereon, were not due to any fault or neglect on the part of the cross-respondent or of the “Olympic II”, or of her master and crew, and the same occurred, were done and occasioned without the consent or privity or knowledge or design of the cross-respondent. Nevertheless the cross-libelant herein seeks to recover of the cross-respondent the sum of \$60,000.00, with interest and costs, being alleged damages which the cross-libelant claims to have suffered by reason of the said collision and alleged injury to the motor vessel “Sakito Maru” and loss of her use during repairs. Many other persons have presented claims and filed suits and actions against the cross-respondent or against the cross-libelant, with respect to which last mentioned claims the cross-libelant has impleaded the cross-respondent as third party respondent, and which claims exceed in their aggregate the sum of \$500,000.00.

V.

Following the said collision the “Olympic II” sank and became, with her tackle, apparel and fur-

niture, a total loss, with no salvage or strippings recovered by the cross-respondent [104] except a lifeboat, certain anchors and chains and life preservers, the reasonable value of which, less the cost of recovering the same, did not and does not exceed the sum of \$412.40. The cross-respondent received from patrons boarding the "Olympic II" on said day the sum of \$3.45 for the use of the facilities of said vessel, and the cross-respondent is informed and believes, and therefore alleges, the freight then pending for said vessel was said sum of \$3.45. The amount claimed by the cross-libelant, as aforesaid, exceeds the value of the "Olympic II", her tackle, apparel and furniture and freight then pending, at the termination of said adventure, and the interest of the cross-respondent therein.

VI.

While in no way admitting that the cross-respondent or the "Olympic II" is liable for any of the losses and damages alleged to have been suffered by the cross-libelant, or which have been or may be claimed by any other persons as a result of said collision, and hereby claiming and reserving the right to contest in this or any other court any liability therefor, either personal or of the "Olympic II", the cross-respondent claims the benefit of limitation of liability, as by the Acts of Congress of the United States provided, and claims to be entitled to have limited its liability, if any, in the premises, to the amount or value of its interest afore-

said in the "Olympic II" and her freight then pending at the time of the termination of said adventure, as aforesaid.

Wherefore, the cross-respondent prays that the cross-libel of Nippon Yusen Kabushiki Kaisya be dismissed with costs; that the cross-respondent have a decree as prayed for in its first amended libel, and such other and further relief as may [105] be meet and proper in the premises.

ALFRED T. CLUFF,
HUGH B. ROTCHFORD,
GEORGE H. MOORE,
CLUFF & BULLARD,

Proctors for Cross-Respondent,
Hermosa Amusement Corporation, Ltd. [106]

(Duly verified.) [107]

[Endorsed]: Filed Jul. 31, 1940. [108]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR CONTINUANCE
OF TRIAL

To: Hermosa Amusement Corporation, Ltd., a Corporation, and J. M. Andersen, and to Their Proctors, Alfred T. Cluff, Hugh B. Rotchford, George H. Moore, and Cluff & Bullard, Esq.;
Grace E. Mayo, Individually and as Administratrix of the Estate of Roy A. Mayo, Deceased, and

to Her Proctors, Wayland & Stearns, Esqs., and to Frank F. Mayo, Individually and as Administrators of the Estate of Roy A. Mayo, Deceased, and to His Proctor, David I. Lippert, Esq.;

George W. Berger and to His Proctor, Perry G. Briney, Esq.; [109]

Lena Karsh, Administratrix of the Estate of Joseph Karsh, Deceased, and to Her Proctors, Edw. C. Purpus and Charles C. Montgomery, Esqs.;

International Broadcasting Company, a Corporation, and to Its Proctor, David A. Fall, Esq.;

Elwood Johnson and Albertine K. Johnson, and to Their Proctor, Gladys Towles Root;

Norma Rubin, Lena Karsh and Florence, Lillian and Shirley Rose Karsh, by Lena Karsh, Their Guardian ad litem, and Their Proctors, Edw. C. Purpus and Charles C. Montgomery, Esqs.;

And to: John Gilbert Montgomery, by His Guardian ad litem, Margerie L. Montgomery, and to His Proctors, Phi O. Clough and David A. Fall, Esqs.:

Please take notice that Nippon Yusen Kabushiki Kaisya, a corporation, respondent, claimant, cross-libelant and petitioner herein, will, on Monday, September 8, 1941, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, in the courtroom of

Honorable Ben Harrison, Judge, move the court to continue the trial of the above-entitled cause, presently set for trial on September 16, 1941, until the testimony of certain necessary witnesses can be obtained by deposition.

Said motion will be based on the affidavit of James L. Adams, hereto attached, the attached memorandum of points and authorities, and the records and files of this cause, and will be made on the ground that certain necessary witnesses cannot be present to testify upon the date this cause is now set [110] for trial and that their testimony by way of deposition is not obtainable prior to such date.

Dated September 2, 1941.

LILLICK, GEARY, McHOSE &
ADAMS,
JAMES L. ADAMS,
REID R. BRIGGS,

Proctors for Nippon Yusen
Kabushiki Kaisha, Re-
spondent, Claimant, Cross-
Libelant and Petitioner.

Good cause appearing therefor, it is

Ordered, That the foregoing notice may be served, personally or by mail, on or before September 3, 1941.

Dated: September 3, 1941.

BEN HARRISON,
District Judge. [111]

AFFIDAVIT OF JAMES L. ADAMS

State of California,
County of Los Angeles—ss.

James L. Adams, being first duly sworn, deposes and says:

That he is one of the proctors for Nippon Yusen Kabushiki Kaisya, a party to the within cause; that shortly after the within cause was set for trial at the call of the term trial calendar in February, 1941, affiant undertook to ascertain the whereabouts of various crew members aboard the Motor Vessel "Sakito Maru" who are witnesses on various phases of the collision between the Motor Vessel "Sakito Maru" and the Fishing Barge "Olympic II" which occurred on September 4, 1940; that affiant was thereafter informed by Nippon Yusen Kabushiki Kaisya that only three of such witnesses were presently aboard the Motor Vessel "Sakito Maru" and that upon the receipt of such information affiant made immediate arrangements to take the depositions of those witnesses upon the arrival of the "Sakito Maru" at Los Angeles Harbor on June 4, 1941; that on such occasion the depositions of T. Yokota, First Officer, G. Kato, Chief Engineer, and S. Shimada, Lookout, were taken.

That affiant was advised by Nippon Yusen Kabushiki Kaisya of the following whereabouts of the following witnesses:

S. Sato, Master.

Due to arrive as passenger on board M. S.

“Kamakura Maru” at Los Angeles Harbor on September 6 so as to be available for trial on September 16, 1941. [112]

T. Karasuda, First Engineer.

Employed aboard M. S. “Kamakura Maru” and available for deposition at Los Angeles Harbor upon arrival September 6, 1941.

A. Kanda, Apprentice Officer.

Resigned from the employ of Nippon Yusen Kabushiki Kaisya and availability for depositions in Japan or elsewhere uncertain.

H. Aono, Quartermaster.

K. Mamba, Quartermaster.

To be sent from Japan to Los Angeles as crew members on board some vessel due to arrive prior to September 16, 1941, so as to be available for depositions.

E. Yokoyama, Apprentice Sailor.

Employed on board S. S. “Rakuyo Maru”, due to arrive Los Angeles Harbor on August 26, 1941, and available for deposition at that time.

N. Nakumura, Electrical Engineer.

Employed on board M. S. “Maruta Maru”, scheduled to arrive at Los Angeles Harbor on July 23, 1941, and available for deposition at that time.

That in accordance with the above information, affiant made plans to obtain the testimony by way of depositions of the witnesses named above at the times and on the occasions indicated above, with the

exception of the testimony of Captain Sato, who has been and still is expected to be present at the time of the trial; that due to the change in relations between the United [113] States of America and the Empire of Japan prior to the time depositions could be scheduled for any of the witnesses named above, the sailings of all of the vessels mentioned above were altered or cancelled and subsequently all Japanese vessels were withdrawn from trade with the United States of America; that as a consequence none of the witnesses whose depositions were scheduled to be taken on the occasions mentioned above were made available for such purpose as previously expected and that it became and now is impossible to obtain the depositions of said witnesses in the United States of America prior to the trial of the within cause scheduled for September 16, 1941, and that it likewise became and is now impossible to arrange for the attendance of such persons as witnesses at such trial; that through the diversion of a vessel of Nippon Yusen Kabushiki Kaisya on a voyage from Japan to South America to a Mexican port, special arrangements have been made for Captain Sato to be transported by airplane from such Mexican port to Los Angeles so as to arrive here on September 16, 1941, or a day or two thereafter.

That the testimony of such unavailable witnesses is material to the case of Nippon Yusen Kabushiki Kaisya in the within cause in the manner hereinafter indicated: that T. Karasuda, First Engineer, was the engineer on watch in the engine room of

the "Sakito Maru" at the time of and for some time prior to the collision and would testify to the receipt of various orders from the bridge of said ship by means of the ship's telegraph, to the execution of such orders and to the speed of the vessel at times pertinent to the collision; that A. Kanda, Apprentice Officer, was on the bridge at the time of the collision and for several hours prior thereto and would [114] testify as to the bearings taken to fix the position of the vessel as the vessel approached Los Angeles Harbor, to the conditions of the weather, to the sounding of fog signals by the "Sakito Maru", to the entries made in the deck memorandum pad maintained on the bridge concerning the events of the collision, to the sighting of the barge and to the events that occurred thereafter; that A. Aono, Quartermaster, was at the wheel at the time of the collision and would testify as to the orders given to him by Captain Sato and to the execution of such orders by himself; that K. Namba, Quartermaster, was at the wheel from 4 to 5 A. M. and from 6 to 7 A. M. on September 4, 1940, and would testify as to the course steered by him, as to being near the forecastle head at 7 A. M. and several minutes thereafter and as to not hearing any fog signals from any other vessels prior to the collision, as to hearing the warning sounded by the lookout at the bow of the "Sakito Maru", as to the hearing of fog signals sounded by the "Sakito Maru" at regular intervals and as to the conditions of the weather; that E. Yokoyama, Apprentice Sailor, was on the forecastle head of the "Sakito

Maru'' after 6:30 A. M. on September 4, 1940, and would testify as to hearing the first fog signals sounded by the "Sakito Maru" and as to standing lookout on the platform at the bow after hearing such signals for a minute or two until relieved by S. Shimada, as to remaining on the forecastle head, as to not hearing any fog signals from any other vessel, as to hearing the fog signal of the "Sakito Maru" being sounded at regular intervals and as to conditions of the weather; that N. Nakamura, Electrical Engineer, was in the engine room of the "Sakito Maru" after 7 A. M. on September 4, 1940, and would testify that he made all the entries of orders received from the bridge in the signal book after the standby order of 7:03 and until 7:11 A. M. [115]

That affiant is informed and believes and upon such information and belief alleges that unless the trial of the within cause is continued until the depositions of such presently unavailable witnesses can be obtained in Japan or elsewhere, the case of Nippon Yusen Kabushiki Kaisya in said cause will be materially prejudiced.

JAMES L. ADAMS.

Subscribed and sworn to before me this 2nd day of September, 1941.

[Seal]

BERNA WADDELL,

Notary Public in and for the
County of Los Angeles,
State of California.

My Commission Expires February 4th, 1945.

[Endorsed]: Filed Sep. 4, 1941. [116]

[Title of District Court and Cause.]

ANSWER OF HERMOSA AMUSEMENT CORPORATION, LTD. AND J. M. ANDERSEN, RESPONDENTS AND THIRD PARTY RESPONDENTS, TO INTERVENING LIBELS.

To the Honorable, the Judges of the United States District Court, for the Southern District of California:

Answering the several libels in intervention and amended libels in intervention filed herein, these respondents and third party respondents allege: [117]

Libel in Intervention and Amendment to Libel in Intervention of Albertine K. Johnson; Elwood Johnson, individually and as Administrator of the Estate of Curtis Elwood Johnson, Deceased.

I.

These respondents allege that they have no knowledge or information as to the following matters and things alleged in the libel in intervention or the amendment thereto, and therefore deny each and all of the same, and demand strict proof thereof from the libelants in intervention.

All the allegations of Articles I, V and VI of the first cause of libel set forth in said libel in intervention; that the said Curtis Elwood Johnson lost his life as a result of the said collision; that the

said Elwood Johnson sustained injuries, physical or mental, as a result thereof; that the said Curtis Elwood Johnson or Elwood Johnson, or either of them, were passengers on board the barge "Olympic II", or that the libelants in intervention or the estate of Curtis Elwood Johnson have been damaged in any sum whatsoever.

II.

These respondents deny each and every allegation of Articles III and IV of the so-called first alternative cause of libel set forth in the said amendment to libel in intervention, except that these respondents admit that the said barge "Olympic II" had no bulkheads in her lower hold from a point 20 feet aft of her stem to her stern, and that it required a boom and winch to raise and lower a lifeboat into the water from said barge, which operation would consume five minutes or thereabouts.

III.

These respondents allege, upon information and belief, that if the said Curtis Elwood Johnson met his death by reason of the said collision or if the libelant in intervention, Elwood [118] Johnson, sustained personal injuries, incurred expenses or lost property as a result thereof, the same and all thereof were caused or contributed to by the fault, negligence and lack of due care of the said Curtis Elwood Johnson and of the said Elwood Johnson in respects not now known to these respondents, but as to which

these respondents will offer proof when ascertained and ask leave to amend this answer accordingly.

Amended Libel in Intervention of Grace E. Mayo
and Frank F. Mayo

I.

These respondents allege that they have no knowledge or information as to the following matters and things alleged in the amended libel in intervention, and therefore deny each and all of the same, and demand strict proof thereof from the libelants in intervention:

All the allegations of Articles Second, Third, Eighth and Fourteenth of the first cause of libel; Article Third of the second cause of libel; that the said Roy A. Mayo was a passenger on board the said barge or met his death as a result of the collision; and that the libelants in intervention, or either of them, or the estate of the said Roy A. Mayo, deceased, suffered damages in any sum whatsoever.

II.

These respondents deny that by reason of the neglect or fault of the master or owner of the barge "Olympic II" or of these respondents, the same was at the time and place of the said collision in an unseaworthy condition, or that the same was at said time and place, or otherwise, negligently maintained or operated. [119]

III.

These respondents allege, upon information and

belief, that if the said Roy A. Mayo came to his death as a result of the said collision, or either of the libelants in intervention suffered damages or incurred expenses as a result thereof, the same and all thereof were caused or contributed to by the fault, negligence and lack of due care of the said Roy A. Mayo in respects not now known to these respondents, but as to which these respondents will offer proof when ascertained and ask leave to amend this answer accordingly.

Intervening Libel of Lena Karsh, Administratrix
of the Estate of Joseph Karsh, Deceased.

I.

These respondents allege that they have no knowledge or information as to the following matters and things alleged in the intervening libel, and therefore deny each and all of the same, and demand strict proof thereof from the intervening libelant:

All the allegations of Article I of the intervening libel; that the libelant in intervention or the estate of the said Joseph Karsh, deceased, or the widow and children of the said deceased, or any of them, suffered damage, general or special, in any sum whatsoever.

II.

These respondents admit that the said Joseph Karsh was on board the barge "Olympic II" at the time of the said collision and met his death as a result thereof.

III.

These respondents allege, upon information and belief, that the death of said Joseph Karsh, and the damages, if any, [120] suffered, and the expenses, if any, incurred by the intervening libelant or the persons named in the intervening libel, and all thereof, were caused or contributed to by the fault, negligence and lack of due care of the said Joseph Karsh in respects not now known to these respondents, but as to which these respondents will offer proof when ascertained and ask leave to amend this answer accordingly.

Intervening Libel of Norma Rubin, et al.

I.

These respondents allege that they have no knowledge or information as to the following matters and things alleged in the intervening libel, and therefore deny each and all of the same, and demand strict proof thereof from the intervening libelants:

All the allegations of Article I of the "First Count on behalf of Norma Rubin", (except that these respondents admit that the said Joseph Karsh met his death as a result of the said collision); that the intervening libelant, Norma Rubin, lost, as a result of the said collision, any of the moneys and property described in Articles III and V of the said "First Count", or that she suffered general or special damages as a result of the said collision in any of the sums alleged in the said "First Count", or in any sum whatsoever.

All of the allegations of Article I of the "Second Count on behalf of Lena Karsh and Florence, Lillian and Shirley Rose Karsh by Lena Karsh, their guardian ad litem", (except that these respondents admit that the said Lillian Karsh and Shirley Rose Karsh were on board the "Olympic II" at the time of the collision).

All the allegations of Articles III, IV, V and VI of the said "Second Count". [121]

All of the allegations of Article II of the "Third Count on behalf of Lillian and Shirley Rose Karsh, by their mother and guardian ad litem, Lena Karsh".

II.

These respondents allege, upon information and belief, that the death of the said Joseph Karsh was caused or contributed to by the fault, negligence or lack of due care of the said Joseph Karsh in respects not now known to these respondents, and that if any of the intervening libelants suffered injuries or damages or incurred expenses or lost property by reason of the said collision, the same and all thereof were caused or contributed to by the fault, negligence and lack of due care of the said Joseph Karsh and of the said libelants in intervention, and each of them, in respects not now known to these respondents. In respect to said faults, negligence and lack of due care these respondents will offer proof when ascertained and ask leave to amend this answer accordingly.

Intervening Libel of John Gilbert Montgomery, by his Guardian Ad Litem, Margerie L. Montgomery.

I.

These respondents allege that they have no knowledge or information as to the following matters and things alleged in the intervening libel, and therefore deny each and all of the same, and demand strict proof thereof from the intervening libelant:

All of Articles Ninth, Eleventh and Twelfth of the intervening libel, and that as a result of the collision the intervening libelant was thrown from the barge "Olympic II" into the water or sustained the injuries alleged in the libel in intervention. [122]

II.

These respondents deny that they, or either of them, negligently manned or operated the barge "Olympic II"; that the barge or either of these respondents failed to give proper signals; deny that the "Olympic II" was anchored in the regular steamship lanes off the port of Los Angeles or was otherwise improperly anchored; admit that these respondents did not "advise or publish" the "Olympic II's" place of anchorage; and deny that the alleged or any fault, carelessness or neglect of these respondents, or either of them, or the barge "Olympic II" caused or contributed to the collision or to the alleged injury or damage to the intervening libelant.

III.

These respondents allege, upon information and belief, that if the said John Gilbert Montgomery suffered injuries by reason of the said collision, the same and all thereof were caused or contributed to by the fault, negligence and lack of due care of the said John Gilbert Montgomery in respects not now known to these respondents, but as to which these respondents will offer proof when ascertained and ask leave to amend this answer accordingly.

Libel in Intervention of George W. Berger.

I.

These respondents allege that they have no knowledge or information as to the character and value of the radio equipment on board the "Olympic II" at the time of the collision or of the labor, if any, expended thereon by the libelant in intervention, and therefore deny that the value of the said radio broadcasting equipment and supplies was the sum of \$18,000.00, or any other sum, or that the intervening libelant expended labor in the in- [123] stallation of the same to the extent of \$2500.00, and demand strict proof of such allegations of the intervening libelant; admit all the other allegations of Article II of the libel in intervention.

II.

Deny, for lack of information and belief, as aforesaid, that the libelant in intervention has been damaged in the sum of \$20,500.00, or any other sum.

Libel in Intervention of International Broadcasting Company, a corporation.

I.

These respondents allege that they have no knowledge or information as to the following matters and things alleged in the libel in intervention, and therefore deny each and all of the same, and demand strict proof thereof from the libellant in intervention:

All the allegations of Articles Fifth and Seventh of the libel in intervention, except that these respondents admit that certain radio equipment was on board the "Olympic II" at the time of the collision and was lost with the said vessel.

Further answering each and all of the said libels and amended libels in intervention, these respondents allege:

I.

Admit that at the times mentioned in the said libels and amended libels in intervention, Hermosa Amusement Corporation, Ltd. was the sole owner and operator of the fishing barge "Olympic II"; that J. M. Andersen was the master thereof; that on September 4, 1940 said barge was anchored at a point in the Pacific Ocean approximately $3\frac{1}{2}$ miles southeast of the west [124] breakwater light, Los Angeles Harbor, bearing 162° true therefrom, and was there engaged in the business of furnishing fishing facilities to patrons for hire; that on September 4, 1940, at about 7:10 A. M., the "Olympic II"

was run down and sunk by the respondent motor vessel "Sakito Maru" with the loss of several lives.

II.

These respondents admit that the collision, and all loss of life and injury and damage to persons and property resulting from the said collision, were solely due to the fault, neglect and lack of due care of the respondent motor vessel "Sakito Maru", her owners, operators, master, officers and crew, in the several respects set forth in the libels in intervention and amended libels in intervention herein, and in other respects which these respondents will prove at the trial. For a more particular statement of the facts and circumstances of the said collision, and of the faults, negligence and lack of due care on the part of the respondent motor vessel "Sakito Maru", her owners, operators, master, officers and crew, these respondents refer to and make a part hereof, as if set forth herein at length, the allegations of Articles III and IV of the first amended libel of Hermosa Amusement Corporation, Ltd. filed herein.

III.

These respondents allege that on September 4, 1940 the "Olympic II", owned and operated by the respondent, Hermosa Amusement Corporation, Ltd., was anchored at the place aforesaid, and was engaged in the business and adventure of furnishing fishing facilities to patrons; and that the said owner respondent used due diligence to make and maintain

the said "Olympic II", her equipment and personnel in all respects seaworthy, sufficient and efficient for the purpose and adventure in which she was engaged. [125] Following the collision the "Olympic II" sank and became and remains, with her equipment, a total loss, and the said adventure terminated at or about 7:15 A. M. on September 4, 1940 at the place of anchorage aforesaid. The value of the strippings of the "Olympic II" and of her freight then pending and of the interest of the said owner respondent therein did not and does not exceed the sum of \$415.85. The amount claimed by each of the intervening libelants herein exceeds the value of the said owner respondent's interest in the said "Olympic II" and her freight then pending, and other suits, claims and demands arising out of the said collision are being asserted against the said owner respondent in sums aggregating more than \$500,000.00. The said collision and all loss and damage consequent thereon were done and occasioned without the consent or privity or knowledge or design of the said owner respondent, and, without admitting any liability for any consequences of the said collision, said owner respondent claims the benefit of limitation of liability as by the Acts of Congress of the United States provided.

Wherefore, these respondents pray that the libels in intervention and amended libels in intervention be dismissed as to these respondents, with costs to these respondents, and that these respondents have

such other and further relief as in law and justice they may be entitled to receive.

ALFRED T. CLUFF
HUGH B. ROTCHFORD
GEORGE H. MOORE
CLUFF & BULLARD

Proctors for Respondents and
Third Party Respondents,
Hermosa Amusement Cor-
poration, Ltd. and J. M.
Andersen.

403 West 8th Street
Los Angeles, Calif.
VAndike 9183. [126]

(Duly verified.)

[Endorsed]: Filed Sep 15, 1941. [127]

[Title of District Court and Cause.]

AMENDMENT TO AMENDED PETITION TO
BRING IN THIRD PARTY RESPOND-
ENTS UNDER ADMIRALTY RULE 56.

To the Honorable Judges of the United States Dis-
trict Court for the Southern District of Cali-
fornia:

Petitioner Nippon Yusen Kabushiki Kaisya
amends its Amended Petition to Bring in Third
Party Respondents under Admiralty Rule 56 by

adding the following at the end of paragraph 5 thereof:

“and that on or about August 28, 1941, a libel in intervention was filed by S. T. Elliott, for personal injuries and property damage.”

LILLICK, GEARY, McHOSE &
ADAMS

JAMES L. ADAMS

REID R. BRIGGS

Proctors for Petitioner [128]

(Duly Verified.)

[Endorsed]: Filed Sep 19, 1941 [129]

District Court of the United States
Southern District of California
Central Division

At a Stated Term, to wit: The September Term, A. D. 1941 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 8th day of September, in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable Ben Harrison, District Judge.

Nos. 1138, 1146, 1147, 1149, 1148, 1154, 1155, 1296-BH Adm.

[Title of Causes.]

[139]

These causes coming on for hearing motion of Nippon Yusen Kabushiki Kaisya, a corporation, respondent, claimant, cross-libelant and petitioner, filed September 4, 1941, in each of the above-entitled causes, for continuance of trial, now set for September 16, 1941; Alfred T. Cluff, Esq., appearing as counsel for the Hermosa Amusement Corporation, Ltd. and J. M. Anderson; F. L. Stearns, Esq., appearing as counsel for Grace E. Mayo, etc.; David I. Lippert, Esq., appearing as counsel for Frank F. Mayo, etc.; H. C. Velpman, Esq., appearing as counsel for Elwood Johnson and Albertine K. Johnson; H. C. Eastham, Esq., appearing as counsel for Roger Culp, etc.; Chas. E. Millikan, Esq., of Messrs. Wright and Millikan, appearing as counsel for Wilma Greenwood; Claude F. Weingand, Esq., counsel for L. R. Ohiser, being absent; Attorney Reay of Messrs. Reay, Scharf, counsel for J. Eldon Anderson being absent; Harvey R. McKee, Esq., appearing as counsel for Wilfred Rasmussen; James L. Adams and Reid R. Briggs, Esqs., appearing as counsel for Nippon Yusen Kabushiki Kaisya, Respondent, etc.; Perry G. Briney, Esq., appearing as counsel for G. W. Berger; E. C. Purpus, C. C. Montgomery, Sr. and C. C. Montgomery, Jr., Esqs., appearing as counsel for Lena Karsh, etc., Norman Rubin, et al.; David A. Fall, Esq., appearing as counsel for International Broadcasting Company; David A. Fall, Esq., appearing as counsel for John G. Montgomery, etc.; Geo. Harnagel, Esq., appearing as counsel for Helen McGrath, etc.; R. Virgil

Allen, Esq., appearing as counsel for Lucy Sylvester; and A. H. Bargion, Court Reporter, being present and reporting the proceedings:

Attorney Adams makes a statement in support of said motion for a continuance, and Attorney Cluff makes a statement.

Attorney Adams presents written statements of T. Karasuda, A. Kanda, H. Aono, K. Nanba, E. Yokoyama, and M. Nakamura, witnesses, as to what they would testify to if called by the respondent Nippon Yusen Kabushiki Kaisya, a corporation, in the above causes, and requests that same be filed herein, and each of the counsel appearing as shown, except absent counsel, stipulating that said witnesses would so testify, if the transcript of the testimony of the three witnesses of respondent before the "A" Board is included, and Attorney Adams states that he is willing to make the transcript before said "A" Board a part of the record. [140]

Attorney Adams argues further in support of motion for a continuance, and makes a statement of what he expects to be able to prove in support of said motion for continuance.

The Court makes a statement and orders said motion for continuance denied without prejudice except as to those libelants whose counsel have not stipulated as to the testimony of the witnesses above referred to, and if their counsel does not so stipulate within forty-eight hours the Court will continue those cases [141]

* * * * *

[Title of District Court and Cause.]

OPINION

This action is a consolidation of various libels and claims arising out of the collision on September 4, 1940, of the Motor Vessel "Sakito Maru", and the fishing vessel "Olympic II", wherein seven and possibly eight persons lost their lives. The present trial was restricted to the sole issue of liability. Naturally, each vessel accuses the other and excuses itself.

The Motor Vessel "Sakito Maru" is a modern merchant vessel engaged chiefly in the transportation of cargo and is powered by two Diesel engines. The dimensions of the "Sakito Maru" are as follows: [142] Length overall 154½ meters or 506.76 feet; length between perpendiculars 145 meters or 465.60 feet; breadth 19 meters or 62.32 feet; gross tonnage 7,126.32 tons; net tonnage 3,900.09 tons.

The distance between the bridge and the bow of the "Sakito Maru" is 65 meters or 213.20 feet. At the time of the collision, the draft of the vessel was 24 feet 7 inches forward and 27 feet 11 inches aft. Loaded as she was at that time, the bridge was about 52 or 53 feet above the waterline.

The vessel is equipped with a gyro compass, located in the wheelhouse and used for steering, and three magnetic compasses, the first also located in the wheelhouse, the second on the flying bridge over the wheelhouse, and the third on the poop deck. A gyro compass consists of a rapidly spinning rotor

so swung as to maintain its axis in the geographical meridian in pointing to the true north. The gyro compass aboard the "Sakito Maru" has no correction and the course shown on it is a true course. The gyro compass is also equipped with a course recorder so that the course of the vessel is recorded on a graph which shows the heading of the vessel, in degrees of the compass, at any and all times. This recorder works automatically.

The "Olympic II" was built of iron in 1877 at Belfast, Ireland; and was originally rigged as a sailing ship known as the "Star of France". In 1933 her three masts were cut down or dismantled in part, and she was converted into the condition in which she was on the day of the collision and was thereafter referred to as a fishing barge. Her dimensions were as follows: Length 238 feet; breadth 38 feet, depth 22 feet; gross tonnage 1,766 tons; net tonnage 1,514 tons. The "Olympic II" was not self-propelled. She had one iron bulkhead which extended athwartships about 20 feet aft of the stem, which met the test for sailing vessels. (see Sec. 65, Rule III, Coastwise Rules). At the time of the collision there were stowed in her hold 1,500 tons of sand, gravel and cement blocks to minimize motion and to add to the comfort of her patrons, and her draft was about 17 feet forward [143] and 17 feet 2 inches aft. She was anchored or moored at that time fore and aft.

At the time of the collision which occurred at about 7:10½ o'clock A. M. on September 4, 1940, the "Olympic" was anchored on a fishing bank com-

monly known as "Horseshoe Kelp", about 3.3 nautical miles in a direction approximating 160 degrees true from the lighthouse, at the end of the west breakwater at the entrance of Los Angeles Harbor and in an area that occasionally is affected by fog.

"Horseshoe Kelp" is and has been for many years known as a fishing ground or bank that attracts a large number of both sport and commercial fishermen. At the height of the season fishing crafts of every description may be found and the number often runs in excess of 100.

For several years last past old vessels have been towed to this fishing ground and there anchored and used as floats from which people can fish. Persons desiring to fish are taxied on shore boats and pay a small fee for an opportunity to enjoy this form of recreation. These boats used as floats are commonly referred to as fishing barges.

On September 4, 1940, beside the "Olympic", two other vessels known as the "Point Loma" and the "Rainbow" were moored in the same general vicinity. The distance between the "Olympic" and the "Point Loma" was 400 yards; between the "Point Loma" and the "Rainbow" 1600 yards; and between the "Olympic" and the "Rainbow" 1800 yards. Cross bearings indicate the "Rainbow" was 144 degrees true, three miles from Los Angeles Lighthouse and the "Point Loma" bore 159 degrees true, three miles from Los Angeles Lighthouse.

The "Olympic", and the time of the collision, was anchored in the open sea and not in or in the

vicinity of any channel or fairway. She was surrounded by miles of navigable waters. Ships leaving Los Angeles Harbor headed south passed in the close proximity of the "Olympic". This was also true of ships entering the harbor from the [144] south. Vessels leaving Los Angeles Harbor for southern ports customarily followed a course varying from 160 degrees true to 162 degrees true. While those approaching from the south usually followed a course of 340 degrees true.

The "Sakito Maru" at the time of the collision was on a voyage from New York to Yokahama, via the Panama Canal and Los Angeles Harbor. Until immediately prior to the collision and since noon, September 3, 1940, the "Sakito Maru" steered a course of 340 degrees true. The first officer went on watch at 3:55 o'clock A. M. and with him on watch were an apprentice officer and two quartermasters, one of whom acted as helmsman, while the other stood lookout, on the bridge. A lookout was also maintained at the bow until daylight. At 5:20 o'clock A. M. a one-point bearing was taken from the south end of Santa Catalina Island. This bearing was followed by three two-point bearings, taken from the southeast end of Santa Catalina Island and from Long Point on Santa Catalina Island. Another two-point bearing was taken at 5:58 o'clock A. M. and still another two-point bearing at 6:08 o'clock A. M. At 6:28 o'clock A. M. a one-point bearing was taken on the southeast end of Santa Catalina Island. These various bearings fixed the

position of the vessel and the same was marked from time to time on the navigating chart.

If the "Sakito Maru" had followed her plotted course, she would not have passed over the fishing grounds and all would have been serene, but due to the influences of wind, current, tide or the usual inaccuracies in steering she varied sufficiently from the plotted course to bring her directly into "Horse-shoe Kelp". It will, therefore, be observed that she had plotted her course so as to avoid said fishing grounds. Of course, there is no evidence indicating she was intentionally endeavoring to avoid said fishing grounds.

The master of the "Sakito Maru" was called to the bridge at 5:58 o'clock A. M., at which time he was told of the position of the vessel. He returned to his quarters, but, pursuant to further in- [145] structions, was called again to the bridge at 7:00 o'clock A. M. Up until that time the weather had been good with clear visibility. The engines of the vessel were set and had been set full ahead and she was proceeding at a speed of 16 knots. At about 7:00 o'clock A. M. it could be seen that it was misty some distance ahead, although visibility on the port and starboard sides of the ship remained good. Visibility ahead at that time was estimated by Captain Sato, before recess, at three miles, and after recess, at one mile. At 7:03 o'clock A. M. an order of slow ahead on the engines was given and promptly executed.

One of the controversial questions in this liti-

gation is the extent of visibility at and just prior to the collision. All witnesses admit that the morning was foggy but the extent of visibility varies from 200 meters to a mile and over. Fortunately, the court has had the benefit of the testimony of a number of disinterested witnesses. While these witnesses gave their estimates, they were not mere guesses because of the location of the "Point Loma" and "Rainbow", which gave them markings to tie into. They also were able to give estimates compared with the length of the "Sakito Maru". From such testimony, I am of the opinion, that the "Olympic" was clearly visible to a person standing in the bow of the "Sakito Maru" for at least 1800 feet. One of the disinterested witnesses produced by the "Sakito Maru" was William H. Collins, Master of the salvage tug "Ray R. Clark", who holds both an operator's and pilot's license for San Pedro and Long Beach area. He has owned boats since 1906 and has spent most of his time on the waters of Los Angeles Harbor. He testified as follows:

"By the Court: How far was the "Point Loma" from the "Olympic"?"

"A. Well, I would say around 1200 feet—1,000 or 1200 feet, is what I would say.

"Q. How far was the "Sakito Maru" from the "Olympic" when you first saw it? [146]

"A. Approximately the same distance; the other side of him maybe not quite as far. Distances on the water, as I have found after many years, are very, very deceiving. I have started

out a thousand times to run a line over to something, and found out that I did not have enough.

“Q. In other words, you generally underestimate than over?

“A. Usually, because you will say, ‘I have got 1200 feet of line, and that will reach over there’, and you roll it out, and when you reach the end it still doesn’t make it.”

This testimony and other of like character has satisfied me that Captain Sato’s estimate of 200 meters cannot be reconciled, even with his previous estimates and that of his first officer, who estimated the visibility at 7:09 o’clock A. M. to be about 600 meters. In fact, the court is given little help from those on board of the “Sakito Maru”. Outside of the testimony of Captain Sato and the first officer, T. Yokota, no one gave even an estimate of visibility. The lookout, S. Shimada, who had three years sea experience, did not know how far the “Olympic” was from the “Sakito Maru” when he first sighted her.

Other evidence that controverts the Captain and the first officer of the “Sakito Maru” is the fact that many witnesses, when they saw the “Sakito Maru”, were not alarmed, because they felt she was going to miss the “Olympic” and had no realization of danger until the “Sakito Maru” was very close when she seemed to change her heading. For instance, take the testimony of Elwood Johnson, a fisherman on the “Olympic” and libelant on account of the death of his son as a result of the collision,

who testified that when he first saw the "Sakito Maru" he had just cast his line out, not having any apprehension of danger, continued to let his line out until it was out approximately 200 yards. He continued fishing and watching the ship until the "Sakito Maru" appeared to turn toward the "Olympic", [147] then thinking the "Sakito Maru" was going to cross his line, reeled it in and when he realized a collision was imminent, ran 12 feet and grabbed hold of the rail. Another example is found in the testimony of Leonard Smith, who had time to run his water taxi from alongside the "Point Loma" to within a point of the bow of the "Olympic", after the "Sakito Maru" came into sight. T. Yokota saw people fishing on the "Olympic" when he first saw her and the lookout testified to the same effect. This testimony corroborates the witnesses who had no realization of danger and further indicates the fog was not very thick. It further indicates that the "Olympic" should have been sighted long before the lookout could discern people on her deck fishing.

Almost without exception witnesses on the "Olympic" and nearby boats, when they first saw the "Sakito Maru", thought she was going to pass them by until all of a sudden she seemed to change her heading toward the "Olympic". The records of the "Sakito Maru" and Captain Sato's testimony establish the fact that when the lookout gave warning of the presence of the "Olympic", a full starboard order was given, and the "Sakito Maru" was ac-

tually responding to such order at the time of the impact. This fact convinces me that many witnesses saw the "Sakito Maru" long before her lookout discovered the presence of the "Olympic", and long before Captain Sato gave the full starboard order.

Evidence also further discloses that the fog was tending to lift at the time of the collision and the bright sun of early September was breaking through and dissipating the fog. The season of the year would negative a dense fog.

I consider the testimony received from the personnel of the "Sakito Maru" very unsatisfactory. The Captain testified that at 7:00 o'clock A. M. his estimate was three miles, which he later changed to one mile. The first officer testified visibility at 7:00 o'clock A. M. was three miles. At 7:09 o'clock A. M. the first [148] officer testified visibility was 600 meters. Other members of the crew would not or could not give an estimate.

The first fault charged by the "Olympic" against the "Sakito Maru" is immoderate speed. In attempting to arrive at the speed of the "Sakito Maru", I have disregarded the testimony of all eye witnesses who attempted to judge the speed and have accepted the evidence furnished by the "Sakito Maru". The testimony of Captain Sato and the first officer, is that the "Sakito Maru" was proceeding at her normal cruising speed of 16 miles per hour up to 7:00 o'clock A. M. At 7:03 o'clock A. M. she encountered fog ahead and reduced her speed to 6½ miles per hour; that it required three min-

utes for her speed through the waters to decelerate to $6\frac{1}{2}$ miles per hour. At 7:09 o'clock A. M. the lookout reported the presence of the "Olympic" ahead. That at that time the "Olympic" was 200 meters ahead. At 7:09 o'clock A. M. the engines were reversed and at 7:10 $\frac{1}{2}$ o'clock A. M. came the collision.

The captain testified that at 7:09 o'clock A. M. visibility extended only 200 meters. It is admitted that when the engines are going slow ahead at $6\frac{1}{2}$ miles per hour and are reversed full astern, the "Sakito Maru" requires 300 meters to come to a full stop. Thus we find a motor vessel proceeding in the fog, approaching an entrance to a harbor where she has every reason to expect the presence of other vessels, proceeding at a speed where she could not possibly bring herself to a stop in time to avoid a collision with either an approaching or anchored vessel. This is a fault chargeable against this motor vessel. Even if the visibility had been in accordance with Captain Sato's estimate of 300 meters, the vessel was going at an immoderate speed. (The Belgian King, 125 F. 869; The Ernest H. Meyer, 84 F. (2d) 496; Silver Line v. U. S. 94 F. (2d) 754.)

Proctors for the "Sakito Maru" advance a theory that "when a navigator exercises reasonable care in determining what are the existing circumstances and conditions but despite the exercise of such [149] reasonable care arrives at what proves later to be an erroneous conception of the same, he cannot be

held liable for permitting his vessel to proceed at a speed which is moderate, when considered in the light of the existing circumstances and conditions as determined by him after the exercise of reasonable care, despite the fact that such speed might not be moderate when considered in the light of the existing circumstances and conditions in reality." In other words, it is their contention that the "Sakito Maru" cannot be held responsible for the error in judging the visibility at the time of the collision. They admit their theory is unique and without authority. It naturally falls under its own weight. The very reading of Article 16 of the International Rules (33 USCA 92) clearly states that the vessel "shall go at a moderate speed, having careful regard to the existing circumstances and conditions."

The same type of argument was raised in *Oceanic Steam Navigating Co. v. John W. Aitken*, 25 Sup. Ct. 317, and answered by Justice Holmes when he stated:

"* * * With reference to a part of the argument, we think it proper to say a word. It is quite true that negligence must be determined upon the facts as they appeared at the time, and not by a judgment from actual consequences which then were not to be apprehended by a prudent and competent man. This principle nowhere has been more fully recognized than by this court. *Lawrence v. Minturn*, 17 How. 100, 110, 15 L. Ed. 58, 62; *The Star of Hope* (*The Star of Hope v. Annan*) 9 Wall. 203, 19

L. Ed. 638. But it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal [150] equation of the man concerned. The motion that it 'should be coextensive with the judgment of each individual', was exploded, if it needed exploding, by Chief Justice Tindal, in *Vaughan v. Menlove*, 3 Bing. N. C. 468, 475. And since then, at least, there should have been no doubt about the law. *Com. v. Pierce*, 138 Mass. 165, 176, 52 Am. Rep. 264; *Pollock*, Torts, 7th Ed. 432."

While Captain Sato estimates the speed of his vessel at $6\frac{1}{4}$ to $6\frac{1}{2}$ miles per hour at 7:09 o'clock A. M., I am satisfied that he is in error in this respect, and that the vessel was proceeding at not less than 8 miles per hour. The records of his own vessel indicate a speed in excess of 6 miles per hour. According to the "Sakito Maru's" deck log and chart, she was 9,120 feet from the "Olympic's" position at 7:03 o'clock A. M. All of that distance, except the last 536 feet, she covered between 7:03 o'clock A. M. and 7:09 o'clock A. M. Thus it will be seen that she covered approximately 8,584 feet in six minutes or 14 miles per hour. With reasonable allowance for error, it will be observed that my estimated speed of 8 miles per hour is conserva-

tive. A check of her tackometer readings also tends to verify my conclusions in this respect.

The charge that the "Sakito Maru" was not giving the proper fog signals has not been sustained. The evidence is overwhelming to the effect that her fog signals were proper.

The "Sakito Maru" is charged with the fault of not having an effective lookout. The evidence as to whether or not a lookout was posted at her bow is very conflicting, but I am accepting the testimony of those on board of the "Sakito Maru", that a lookout was on duty. I appreciate the fact that many witnesses testified that they saw no lookout, but I am inclined to accept the positive in place of the negative testimony.

But in view of my findings heretofore expressed on the visibi- [151] lity, it is quite apparent, that the lookout was a lookout in name only. He was charged with the responsibility of seeing that which was within his vision. This he failed to do. If he had been an efficient lookout, the collision easily could have been avoided and this failure of the lookout must be charged as a gross fault against the "Sakito Maru". (The Catalina, 18 F. Supp. 461 and cases therein cited.)

The "Olympic" also complains of the post-collision conduct of the "Sakito Maru" in two respects:

First, the withdrawal of the bow from the wound of the "Olympic": The impact took place at 7:10½ o'clock A. M. and the engines of the "Sakito Maru"

were stopped at 7:11 o'clock A. M. and were then put astern at 7:13 o'clock A. M. and the "Olympic" sank at 7:14 o'clock A. M. The wound according to the markings on the bow of the "Sakito Maru" after the collision, showed she had penetrated the "Olympic" 20 feet and 3 inches on the portside and 23 feet on the starboard side and a cross-ship's line between these two lines was 12 feet. The "Olympic" contends that good seamanship should have caused the "Sakito Maru" to hold her position in the wound until those on board were removed and that if she had done so, the sinking of the "Olympic" would have been delayed. The evidence on this feature of the case is very conflicting. I am of the opinion that the "Sakito Maru" did not put her engines astern until after the vessels had separated of their own accord. It seems to me that theorizing on whether the "Olympic" could have been kept afloat with such a wound in her mid-ship is too highly speculative to be placed in the category of a fault.

Second, the failure of the "Sakito Maru" to render immediate aid: The facts disclose that the "Sakito Maru's" engines were put astern at 7:13 o'clock A. M. and backed at least 300 meters, dropped her anchor at 7:17 o'clock A. M. and stopped her engines at 7:19 o'clock A. M. and lowered a life boat at 7:20 o'clock A. M. Inas- [152] much as there were other boats present at the scene of the collision, no loss of life was occasioned by any such delay, consequently, her conduct in no manner contributed to the loss of life and under the circumstances cannot be deemed a fault.

The "Sakito Maru" in its cross-libel charges the "Olympic" with many faults. She charges the "Olympic" with the failure of having a competent and attentive lookout on board. It appears that Louis R. Ohiser, the lookout, has proven himself to be an unstable witness and I have for the purpose of this opinion disregarded his testimony except where it has been amply corroborated. The evidence clearly shows that he saw the "Sakito Maru" long before the lookout of the "Sakito Maru" saw the "Olympic", and to that extent was more attentive to his duties than the "Sakito Maru's" lookout. In fact, the two are about equal as witnesses. One cannot tell the same story twice, while the other does not know anything except he was acting as a lookout and saw the "Olympic". Be that as it may, as a lookout, there was nothing Ohiser could do. His vessel was anchored. He could look and he could see, but there was nothing he could do to avoid the collision. The ability to avoid the collision rested entirely on the oncoming "Sakito Maru". The proctors for the "Sakito Maru" contend that he could have rung the bell louder, but there was no occasion to make a special effort in this regard until such time as it appeared that a collision was imminent. He had no reason to believe that the "Sakito Maru's" personnel could not see as well as he could; nor, that they had been unable to hear the various signals given by the "Olympic" and other vessels. The failure to have a lookout must have been a contributing cause of

the collision before it can be classed as a fault. (The Europe, 190 F. 475; The Blue Jacket, 144 U. S. 371, 12 Sup. Ct. 711.)

The "Olympic" is further charged with the failure to give the proper fog signals. The evidence is overwhelming to the effect that the proper signals were given. The only conflict raised in this [153] regard, is the testimony of the personnel of the "Sakito Maru" that no signals were heard until just immediately prior to the impact, and here again I have accepted positive testimony as against the negative.

The "Sakito Maru" charges that the "anchoring and deliberately maintaining the "Olympic" in a known steamer lane was a gross fault directly causing and contributing to the collision and all consequent losses."

As heretofore pointed out the "Olympic" was not anchored in a channel or fairway but upon the open ocean, consequently, she was not anchored in violation of 33 USCA 409. This feature of the case resolves itself into the question whether or not a vessel at its own peril anchors on a fishing bank, when said fishing bank happens to be in close proximity to a course used by merchant vessels. It makes no difference whether the "Olympic" was anchored three months or one hour. Was it a fault per se for the "Olympic" to be so anchored at 7:09 o'clock A. M. on September 4, 1940?

Proctors for the "Sakito Maru" cite Admiral Schley, 131 F. 433; The Persian, 181 F. 439, and

other cases, but they teach nothing more than that it is a fault to anchor in such a manner as to prevent or obstruct the passage of other vessels in channels and fairways. It has been held that even in a navigable channel there is no prohibition against anchoring, where under the circumstances there is sufficient room for moving vessels obeying the law to pass in safety. (*The Europe*, supra; *The Oregon*, 158 U. S. 186; *The John G. McCullough*, 232 F. 637.)

Proctors for the "Olympic" contend that she was a fishing vessel and therefore a favored vessel (33 USCA 111 and 211) but it is doubtful whether she can be classed as a fishing vessel within the purview of said sections.

The "Sakito Maru" claims that the "Olympic" was warned by Philip J. Moynahan, a warrant officer of the Coast Guard, of her dangerous position. He testified in his deposition as follows: [154]

"Q. I wish you would state whether the position of the "Olympic II", as indicated on that chart, was in or out of any of the sea lanes?

"A. I would say just outside of the main sea lane of that course usually taken by ships leaving Los Angeles on a southerly course for the Canal Zone and other points South.

"Q. Would that be equally true if the vessels were bound in, from the opposite direction?

"A. Yes, it would simply mean that they were coming in on a reverse course.

“Q. Speaking from your twenty years experience at sea, and your knowledge of conditions in that harbor, and in and out of it, please state, in your opinion, if it was dangerously close or a safe distance away?

“A. Dangerously close.”

Again, he also testified as follows:

“A. We made our boarding in a routine manner, inspecting all equipment etc. and in the course of our conversation with the person in charge, informed him that we thought they were anchored in a very dangerous place.

“Q. Was any reply made by the Master?

“A. He replied that he had, of course, nothing to do with that; that he was only acting for the owner. He gave us the name and address of the owner. I don't remember anything more.”

There is no evidence that this information was brought home to the owners of the “Olympic”. It will be further noted that he did not testify she was anchored on a sea lane, but dangerously close to one and that “he thought” or in other words he had an opinion on the subject. [155]

Under Section 1, 33 USCA, the Secretary of War had sufficient authority to prevent the anchoring of the “Olympic” at her place of anchorage. In view of the fact that the “Olympic” and other vessels had been accustomed to so anchor over a long period of time, it is reasonable to assume that if

the Secretary of War considered the place of anchorage of the "Olympic" dangerous to navigation he would have acted. Certainly, there is no presumption that the Secretary of War failed to perform his duties in that respect. As a matter of fact, the presumption is to the contrary.

I hold that the "Olympic" was violating no law in anchoring at her place of anchorage on the morning of the collision and that the "Sakito Maru" had no superior right of passage. To hold otherwise would preclude sport fishermen from anchoring at any time on the open unobstructed ocean.

Even if her place of anchorage was dangerous, such fact would not permit the "Sakito Maru" from escaping the consequences of her own failure in avoiding the collision when she had the ability to do so, as hereinafter more fully discussed under the heading of unseaworthiness.

The further charge is made that the "Olympic" was incompletely and inadequately manned, because it failed to comply with the statutory requirements of certified personnel, particularly 46 USCA 672 (a), (b) & (c). Without discussing the applicability of said sections to the "Olympic", suffice it to say, that the lack of such personnel, by no stretch of imagination contributed to the collision or the resultant damage and loss of life. If there had been more people on board the "Olympic", the loss of life would undoubtedly had been greater.

The "Sakito Maru" charges the "Olympic" was unseaworthy because she did not have a certificate

of inspection required by statute and because she failed to pass inspection required by statute.

The evidence shows that in 1938 the "Olympic" had the necessary certificate of inspection. That at that time the local inspectors recalled said certificate claiming all anchored pleasure vessels had [156] to comply with the Load Line Act. (46 USCA 85). When the inspectors had determined that this section had no application and the standards of safety as provided by the General Rules and Regulations for coastwise passenger vessels, they decided 46 USCA 395 applied. It is a matter of common knowledge that there has been considerable confusion in the minds of the authorities concerning the authority of the local inspectors over such vessels as, the "Olympic". The large number of similar vessels anchored off the coast of Southern California used as pleasure crafts for fishing and gambling is unique to this district, and the problem of inspection and ascertaining their seaworthiness for the protection of the public has been a responsibility that the departments of the government have been anxious and ready to assume, provided they had authority to do so. Finally in 1940, the Bureau of Navigation insisted these pleasure vessels were subject to inspection under the provisions of 46 USCA 395, 396, 397, and 398. Therefore, on June 3, 1940, the U. S. Local Inspectors directed a circular letter to the "Olympic" enclosing certain minimum requirements as follows:

“Non-self propelled vessels over 100 gross tons, anchored or moored on the seas or on waters connected therewith, that are not protected from the hazards of the sea, which are patronized by the public for pleasure purposes, are subject to and shall be inspected and certificated pursuant to the provisions of the act of Congress approved May 28, 1908. (46 U.S.C. 395, 396, 397, 398.)

“The following general provisions constituting minimum requirements shall be followed in the inspection and certification of such vessels:”

Then follows some 41 minimum requirements. However, these requirements had not been enforced and owners of these pleasure vessels were given a reasonable length of time to comply with the same. Require- [157] ment No. 4 reads as follows:

“A sufficient number of transverse watertight bulkheads shall be fitted so that the vessel will remain afloat with positive stability in the event any one main compartment is flooded.”

Said Section 395 provides as follows:

“The local inspectors of steamboats shall at least once in every year inspect the hull and equipment of every seagoing barge of one hundred gross tons or over, and shall satisfy themselves that such barge is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in a condition to warrant the be-

lief that she may be used in navigation with safety to life. They shall then issue a certificate of inspection in the manner and for the purposes prescribed in sections 399 and 400. (May 28, 1908, c. 212, Sec. 10, 35 Stat. 428.)

It will be noted from that section that no rule making power is vested in the local inspectors. It will be further noted that Section 395 is a part of Chapter XIV, which provides for the inspection of steam vessels and that 46 USCA 375, provides for and invests in the Supervising Inspectors power to promulgate certain rules and regulations but nowhere do I find any such power vested in local inspectors. Even if they had such powers under Section 395, the same would of necessity have to apply to all seagoing barges. Heretofore, bulkhead requirements have been covered by Congress (46 USCA 482 and 483) and by the Supervising Inspectors (Sec. 72, Rule III and Section 65 of Rule IV, as well as others, General Rules and Regulations prescribed by the Board of Supervising Inspectors.) *The Bee*, 138 F. 303; *Towboat No. 1*, *Norfolk & Western*, 74 F. 906; *The H. M. Whitney*, 86 F. 697. I therefore hold that the so-called minimum requirements of the [158] local inspectors were a nullity and the failure to comply with the same does not establish the unseaworthiness of the "Olympic".

I further hold that the "Olympic" was not a seagoing barge within the contemplation of Section 395, 46 USCA. Congress has not defined the term "barge", except when used in connection with Sections 643a, 660b and 672b (46 USCA 672c). Gen-

erally speaking, "barge" is "a word of somewhat comprehensive signification", (9 C.J.S. 1542) and may cover crafts of many kinds. It may cover "pleasure boats, or boats of state, furnished with elegant apartments, canopies, and cushions, equipped with a band of rowers, and decked with flags and streamers, used by officers or magistrates and a flat bottomed vessel of burden for the loading and unloading of ships." (The Mamie, 5 F. 813).

The Encyclopedia Britannica defines "barge" as follows:

"The name barge was originally applied to a small sailing vessel but afterwards came into general use for a flat bottomed boat used for carrying goods on inland waterways. * * * Barges are usually towed or fitted with some kind of engine. The state barge was a heavy ornamented vessel used for carrying passengers on occasion of state ceremonies. College barges are houseboats moored in the river for the use of members of college rowing clubs.

* * *

"The common principle of all types of barges and lighters is to have as large a hatchway as possible and as small a deck area as possible to save what is called "cupboard space" under deck in the hold and to make for easy and quick handling and therefore cheapness in loading and discharging cargoes."

The Oxford English Dictionary defines it as follows:

“A small seagoing vessel with sails; a flat [159] bottomed freight boat chiefly for canal and river navigation, either with or without sails. In the latter case also called a lighter. In the former, as in the Thames barges, generally dandy rigged having one important mast. * * * A rowing boat especially a ferry boat. * * * The second boat of a man of war; a long narrow boat generally with not less than ten oars for the use of the chief officers. * * * A large vessel propelled by oars or towed, generally much ornamented and used on state occasions. * * * An ornamental, houseboat. * * * A double decked passenger and freight vessel without sails or power and towed by steamboat.” (Webster’s International Dictionary definition also given).

In the limitation proceedings proctors for the “Sakito Maru”, contended that the “Olympic” was not a “barge”—a general name given to a large pulling boat. It is often given to flat bottomed craft, but more particularly to vessels built for towage purposes and cite as their authority Bradford’s Glossary of Sea Terms.

It is therefore apparent it is necessary to ascertain the sense Congress used the word “barge” in said section 395, just as Judge Brown did in *The Mamie*, supra. Naturally, the word “barge” should be interpreted and applied within the manifest intent of Congress. (25 R.C.L. 988; 59 C.J. 1016, 1021).

The Congressional Record and particularly Sen-

ate Committee Report No. 560 clearly indicates the hazards that Congress desired to remedy and from said report it is clear that Congress intended to provide for the inspection of a type of vessel of ship shaped for the carrying of cargo under deck and used exclusively for the carrying of freight, equipped with large hatches. Such barges had no power of self-propulsion and were usually towed from port to port. [160]

This report throws an interesting light on the attempt of the local inspectors to promulgate rules. In said report among other things it is stated:

“The first section of the bill provides for an inspection of the hulls of such barges similar to the inspection to which the hulls of seagoing freight steamers are subject, under Sections 4421 and 4423, Revised Statutes. The second section requires a simple but indispensable life saving equipment. In many instances, doubtless, this equipment is now provided. It should be required in all instances.”

Clearly indicating that the inspection was to be limited to the hulls.

In endeavoring to follow out the intent of Congress, I hold that the “Olympic” was not a barge within the purview of said Section 395.

The failure to provide for the inspection of pleasure vessels such as the “Olympic” is a problem for Congress and the Supervising Inspectors and it is not the function of the courts to distort existing legislation as a substitute for such omission. This

court is faced with the same problem in this regard that faced the court in *The Bee*, *supra*.

Even if the failure to have bulkheads as ordered by the local inspectors might be deemed a fault, I am of the opinion that the "Sakito Maru" is solely chargeable with the loss of life, personal injuries and property damages suffered by reason of said collision. The "Sakito Maru" by the exercise of reasonable care and prudence could have avoided the collision and I do not believe it lies within her mouth to shift any part of the damages to the "Olympic" by claiming she should have been equipped with more bulkheads. The immoderate speed coupled with her failure to have a competent and efficient lookout was the sole proximate cause of said collision.

I appreciate the fact that the "last clear chance" rule is not generally considered applicable in this country in admiralty (*The [161] Norman B. Ream*, 252 F. 409), at the same time our courts have not been backward in applying the rule under whatever name it may be labeled. *The Yucatan*, 226 F. 437; *Crowley Launch & Tugboat Co. v. Wilmington Transportation Co.* 117 F. (2d) 651; *American Hawaiian S.S. Co. v. King Coal Co.*, 11 F. (2d) 41; *The William A. Paine*, 39 F. (2d) 586; *The Europe*, 190 F. 475. However, Judge Augustus N. Hand, in the recent case of the *Cornelius Vanderbilt*, 120 F. (2d) 766, apparently recognized the rule under its true color when he stated:

"The *Hempstead* was aware of the approach of the *Watuppa* and her barge in time to avoid

the collision and, if she was not, should have seen them, but for her neglect to maintain a proper lookout. She had the Watuppa on her starboard hand and, as her master conceded, was bound to give the *matter* the right of way. The Watuppa, however, having a tow on a long hawser, difficult to manage in dangerous waters, could not readily swing her barge to the starboard of its position in the channel. Though each vessel neglected to blow passing signals, as required by the rules, and the Watuppa was on the wrong side of the channel, the outstanding fact is that the Hempstead had the last clear chance to prevent a collision by the exercise of ordinary care at a time when the Watuppa had the right of way and was not in a position to swing her tow away from the Hempstead's barges in time to avert disaster. Instead of holding back, the Hempstead took the risk of coming on and then attempting to swing her tow to port—a difficult manoeuvre in a narrow dangerous channel which failed of success.”

Proctors for the “Sakito Maru” in summing up their case ask me to apply the rule set forth in the Samuel Dillaway, 98 F. 138, in [162] judging the conduct and demeanor of the various witnesses. I heretofore expressed myself relative to the testimony of Ohiser. I recognize Captain Sato as an experienced master of exceptional ability and as a very impressive and convincing witness, but in view of my inability to reconcile the strong and convince-

ing testimony of disinterested witnesses with that of Captain Sato, I am impelled to apply the rule in the Samuel Dillaway, *supra*, wherein the court said:

“This practical rule is only an application of the facts that the best disposed persons are prone to imagine theories to excuse the results of their own oversights, and that on the high seas the rapid occurrence of events, in connection with the approach of two colliding vessels at night, naturally leaves confusion in the minds of those who fail to maintain proper vigilance and a state of preparation, and who are, therefore, surprised by unexpected, sudden catastrophes.”

I am therefore convinced that Captain Sato in loyalty to his own ship and crew has placed too much credence in the testimony of his own lookout and has thereby unconsciously submerged his own opinion and permitted the testimony of the lookout to become his own present conclusion.

The property damage claims of the Hermosa Amusement Corporation, Ltd., George W. Berger and Norma Rubin as set forth in the first count in her libel in intervention will be referred to David B. Head, Esq., U. S. Commissioner, as Special Master. The balance of the claims will be heard in this court.

Upon the ascertainment of the award to the respective parties entitled thereto, the court will enter its decree in accordance with this opinion.

Dated: Los Angeles, California, this 31st day of October, 1941.

BEN HARRISON

Judge

[Endorsed]: Filed Oct. 31, 1941. [163]

[Title of District Court and Cause.]

STIPULATION AS TO REASONABLENESS
OF STIPULATED DECREES

Whereas, an amended libel in intervention was filed herein by Grace E. Mayo and Frank F. Mayo, individually and as administrators of the Estate of Roy A. Mayo, Deceased, libelants, against the Motor Vessel "Sakito Maru", etc., and Nippon Yusen Kabushiki Kaisya, a corporation, respondents, claiming damages for the death of Roy A. Mayo; and

Whereas, it has been stipulated between said libelants and said respondents that a decree may be entered herein against said respondents in the amount of \$4,100 for damages for the death of said Roy A. Mayo; and

Whereas, a libel in intervention was filed herein by Lena Karsh, Florence, Lillian, and Shirley Rose Karsh, by Lena Karsh, their guardian ad litem, libelants, against the Motor Vessel "Sakito Maru", etc., and Nippon Yusen Kabushiki Kaisya, a [166] corporation, respondent, claiming damages for the death of Joseph Karsh, for personal injuries, and for the loss of personal effects; and

Whereas, it has been stipulated between said libelants and said respondents that a decree may be entered herein against said respondents in the

amount of \$5,500 for damages for the death of said Joseph Karsh; and

Whereas, a libel in intervention was filed herein by Albertine K. Johnson and Elwood Johnson, individually and as administrators of the Estate of Curtis Elwood Johnson, Deceased, libelants, against the Motor Vessel "Sakito Maru", etc., and Nippon Yusen Kabushiki Kaisya, a corporation, respondents, claiming damages for the death of Curtis Elwood Johnson; and

Whereas, it has been stipulated between said libelants and said respondents that a decree may be entered herein against said respondents in the amount of \$4,500 for damages for the death of said Curtis Elwood Johnson; and

Whereas, an amended libel was filed, and is consolidated herein, by Helen McGrath, Helen McGrath as administratrix of the Estate of Peter Bernard McGrath, Deceased, and Helen McGrath as special administratrix of the Estate of James B. McGrath, Deceased, libelants, against the Japanese Motor Vessel "Sakito Maru", etc., Nippon Yusen Kabushiki Kaisya, a corporation, respondents, claiming damages for the deaths of said Peter Bernard McGrath and James B. McGrath; and

Whereas, it has been stipulated between said libelants and said respondents that a decree may be entered herein against said respondents in the amount of \$17,000 for damages for the death of said Peter Bernard McGrath and in the amount of \$3,000 for damages for the death of said James B. McGrath; and [167]

Whereas, an amended libel was filed, and is consolidated herein, by Roger S. Culp, individually and as administrator of the Estate of Joseph W. Culp, Deceased, libelant, against the Motor Vessel "Sakito Maru", etc., and Nippon Yusen Kabushiki Kaisya, a corporation, respondents, claiming damages for the death of Joseph W. Culp; and

Whereas, it has been stipulated by said libelant and said respondents that a decree may be entered herein against said respondents in the amount of \$4,050 for damages for the death of said Joseph W. Culp; and

Whereas, an amended libel was filed, and is consolidated herein, by Wilma Greenwood and Jack M. Greenwood, by Wilma Greenwood, his guardian ad litem, libelants, against the Motor Vessel "Sakito Maru", etc., and Nippon Yusen Kabushiki Kaisya, a corporation, respondents, claiming damages for the death of Jack Greenwood; and

Whereas, it has been stipulated by said libelants and said respondents that a decree may be entered herein against said respondents in the amount of \$7,500 for damages for the death of said Jack Greenwood; and

Whereas, an amended libel was filed, and is consolidated herein, by Lucy Sylvester as administratrix of the Estate of Joseph Sylvester, Deceased, libelants, against Nippon Yusen Kabushiki Kaisya, a Japanese corporation, respondent, claiming damages for the death of Joseph Sylvester; and

Whereas, it has been stipulated by said libelants and said respondent that a decree may be entered

herein against said respondent in the amount of \$5,000 for damages for the death of said Joseph Sylvester; and

Whereas, a libel in intervention was filed herein by [168] John Gilbert Montgomery, by his guardian ad litem, Margerie L. Montgomery, libelant, against Nippon Yusen Kabushiki Kaisya, a corporation, respondent, claiming damages for personal injuries and damage to and loss of personal property; and

Whereas, it has been stipulated between said libelant and said respondent that a decree may be entered herein against said respondent in the amount of \$625 for damages for said personal injuries and damage to and loss of personal property; and

Whereas, a libel in intervention was filed herein by S. T. Elliott, libelant, against Nippon Yusen Kabushiki Kaisya, a corporation, respondent, claiming damages for personal injuries and for loss of personal property; and

Whereas, it has been stipulated between said libelant and said respondent that a decree may be entered herein against said respondent in the amount of \$300 for damages for said personal injuries and loss of personal property; and

Whereas, a libel was filed, and is consolidated herein, by J. Eldon Anderson, libelant, against Nippon Yusen Kabushiki Kaisya, a corporation, respondent, claiming damages for personal injuries; and

Whereas, it has been stipulated between said libelant and said respondent that a decree may be

entered herein against said respondent in the amount of \$300 for damages for said personal injuries; and

Whereas, all of said damages are alleged to have been occasioned by the collision of the Motor Vessel "Sakito Maru" and the Fishing Barge "Olympic II" on September 4, 1941; and

Whereas, third party petitions have been filed by Nippon Yusen Kabushiki Kaisya, a corporation, impleading and praying for relief as therein set forth against Hermosa Amusement Corporation, [169] Ltd., a corporation, and J. M. Andersen, in connection with each of said libels;

It Is Hereby Stipulated and Agreed by Hermosa Amusement Corporation, Ltd., a corporation, and J. M. Andersen, third party respondents, through their respective undersigned counsel, without prejudice to any other matter, that the respective amounts hereinabove recited are reasonable awards for the above described damages suffered by the respective libelants, occasioned by the collision of the Motor Vessel "Sakito Maru" and the Fishing Barge "Olympic II".

Dated: December 16th, 1941.

ALFRED T. CLUFF,
HUGH B. ROTCHFORD,
GEORGE H. MOORE,
CLUFF & BULLARD,

Proctors for Hermosa Amusement Corporation, Ltd., and
J. M. Andersen.

[Endorsed]: Filed Dec. 16, 1941. [170]

In the District Court of the United States for
the Southern District of California, Central
Division

In Admiralty—No. 1138-BH

HERMOSA AMUSEMENT CORPORATION,
LTD., a Corporation,

Libelant,

vs.

The Motor Vessel “SAKITO MARU”, etc., et al,
Respondents.

NIPPON YUSEN KABUSHIKI KAISYA, a
Corporation,

Claimant and Petitioner.

HERMOSA AMUSEMENT CORPORATION,
LTD., a Corporation, J. M. ANDERSEN, et al,
Third Party Respondents.

FINAL DECREE AND JUDGMENT FOR LI-
BELANT, HERMOSA AMUSEMENT COR-
PORATION, LTD.

This cause, at issue on the First Amended Libel of the libelant, Hermosa Amusement Corporation, Ltd., and the Answer of the claimant thereto, and on the Cross-Libel of the claimant, respondent and cross-libelant, Nippon Yusen Kabushiki Kaisya, and the Answer of the cross-respondents, Hermosa Amusement Corporation, Ltd. and J. M. Andersen, thereto, having been consolidated for trial with various other libels and claims arising out of the collision between the respondent motor vessel “Sa-

kito Maru" and the libelant's vessel "Olympic II" on September 4, 1940;

And the said consolidated causes coming on regularly for trial on September 16, 1941, and having been duly tried, argued and submitted to the court for decision on the issue of liability for the said collision; [180]

And the court, after due consideration, having on October 31, 1941, rendered and filed herein its detailed opinion in writing, which opinion the court hereby adopts as its findings of fact and conclusions of law on the issues of liability for the said collision, and further finds and concludes as follows:

That the collision on September 4, 1940, between the respondent motor vessel "Sakito Maru" and the libelant's vessel "Olympic II" was due solely to the faults of the "Sakito Maru", her master, officers and crew in the respects in said opinion set forth; that neither the said collision nor any of the consequences thereof was due to any fault, omission or neglect on the part of the "Olympic II" or her crew, or of the libelant or of the cross-respondent, J. M. Andersen, in any of the respects alleged in the answer to the amended libel herein or in the cross-libel herein, or otherwise; that as a result of the said collision and on September 4, 1940, the "Olympic II" sank and, with her tackle, apparel and furniture, became a total loss; that at the time of the collision the libelant, Hermosa Amusement Corporation, Ltd., was the sole owner of the "Olympic II", her tackle, apparel and furniture; that the

said libelant is entitled to have and recover from the respondent motor vessel "Sakito Maru", her engines, etc., and from the respondent and claimant, Nippon Yusen Kabushiki Kaisya, and Fidelity and Deposit Company of Maryland, a corporation, its stipulator for costs and value, the amount of its damages by reason of the said collision, with interest at the rate of 7% per annum from September 4, 1940, to the date of this decree, and for its costs of suit; and that the cross-libelant, Nippon Yusen Kabushiki Kaisya, take nothing by reason of its cross-libel;

And the court having referred it to David B. Head, Esq., as commissioner, to ascertain and report the amount of the damages [181] suffered by the libelant, Hermosa Amusement Corporation, Ltd., and the commissioner, on March 6, 1942, having filed his report, finding and reporting the amount of the libelant's said damages in the sum of \$29,500.00, and requesting that his fees as such commissioner be fixed and allowed; and the libelant and the claimant each having filed exceptions to the said report, and the court, after consideration, having overruled all of said exceptions, ordered that the said report be in all respects confirmed, and that the commissioner's fees as respects the reference of the matter herein adjudicated be fixed and allowed at the sum of \$200.00;

Now, therefore, on motion of Alfred T. Cluff, Esq., one of the proctors for the libelant, Hermosa Amusement Corporation, Ltd., it is hereby

Ordered, Adjudged and Decreed as follows:

1. That the report of the commissioner, David B. Head, Esq., in so far as the same affects above named libelant, filed herein on March 6, 1942, be, and the same is, hereby in all respects approved and confirmed, and the findings and conclusions of the commissioner therein set forth be, and the same are, hereby adopted as the findings and conclusions of the court.

2. That the libelant, Hermosa Amusement Corporation, Ltd., have and recover of and from the respondent motor vessel, "Sakito Maru", her engines, tackle, apparel, furniture and equipment, and from the claimant and respondent, Nippon Yusen Kabushiki Kaisya, a corporation, and from Fidelity and Deposit Company of Maryland, a corporation, said claimant's stipulator for value and costs, the amount of its damages found by the commissioner, to-wit, the sum of \$29,500.00, with interest thereon at 7% per annum from September 4, 1940, to the date of this decree, to-wit, the sum of \$3172.07, or an aggregate sum of \$32,672.07, to- [182] gether with its costs taxed in the sum of \$237.08, all with interest from the date of this decree at the rate of 7% per annum until paid.

3. That David B. Head, Esq., commissioner, have and recover of the claimant and respondent, Nippon Yusen Kabushiki Kaisya, a corporation, and from Fidelity and Deposit Company of Maryland, a corporation, the claimant's stipulator for

value and costs, the sum of \$200.00, his fees in the reference in the matter herein adjudicated, together with interest at the rate of 7% per annum from the date hereof until paid.

4. That the cross-libel of Nippon Yusen Kabushiki Kaisya be, and the same is, hereby dismissed.

5. That all third party petitions filed herein by Nippon Yusen Kabushiki Kaisya against Hermosa Amusement Corporation, Ltd., and J. M. Andersen be, and each of the same is, hereby dismissed.

6. That unless this decree be satisfied within thirty (30) days after the entry hereof and notice to James L. Adams, Esq., and Messrs. Lillick, Geary, McHose & Adams, proctors for claimant and respondent, Nippon Yusen Kabushiki Kaisya, the stipulator for costs and for value on the part of said claimant and respondent, cause the engagements of its stipulations to be performed or show cause within four (4) days after the expiration of said thirty (30) days why execution should not issue against its goods, chattels and lands to enforce satisfaction of this decree.

Dated: March 17, 1942.

BEN HARRISON,

United States District Judge.

[Endorsed]: Filed and entered Mar. 17, 1942. [183]

In the District Court of the United States for
the Southern District of California, Central
Division.

In Admiralty—No. 1138 B.H.

HERMOSA AMUSEMENT CORPORATION,
LTD., a California corporation,

Libelant,

-vs-

THE MOTOR VESSEL "SAKITO MARU", HER
ENGINES, TACKLE, APPAREL, FURNI-
TURE, ETC., AND THE MASTER AND
OWNERS THEREOF, AND N.Y.K. LINES,
NIPPON YUSEN, KAISHA STEAMSHIP
CO., a corporation, NIPPON YUSEN KABU-
SHIKI KAISYA,

Respondents,

GRACE E. MAYO and FRANK F. MAYO, in-
dividually and as the Administrators of the
Estate of ROY A. MAYO, Deceased,

Libelants in Intervention,

-vs-

HERMOSA AMUSEMENT CORPORATION,
LTD., a California corporation, THE MOTOR
VESSEL "SAKITO MARU", HER EN-
GINES, TACKLE, APPAREL, FURNI-
TURE, ETC., AND THE MASTER AND
OWNERS THEREOF, AND N.Y.K. LINES,
NIPPON YUSEN KAISHA STEAMSHIP
CO., a corporation, NIPPON YUSEN KAI-

SHA KABUSHIKI, A CORPORATION OF
THE EMPIRE OF JAPAN, JOHN DOE,
AND RICHARD ROE,

Respondents in Intervention.

AMENDED LIBEL IN INTERVENTION OF
GRACE E. MAYO AND FRANK F. MAYO

To the Honorable Judges of the District Court of
the United States for the Southern District of
California:

Comes now the Libelant in Intervention, Grace E. Mayo, as one of the Administrators of the Estate of Roy A. Mayo, Deceased, and by way of Libel in Intervention against the above named Respondents in Intervention, complains and alleges as follows: [186]

First: That the Libelant, Grace E. Mayo, is one of the appointed, qualified and acting Administrators of the Estate of Roy A. Mayo, deceased, in proceedings No. 198190 pending in the Superior Court of the State of California, in and for the County of Los Angeles.

Second: That said Frank F. Mayo, was the father of Roy A. Mayo, and said Grace E. Mayo, was the mother of Roy A. Mayo, deceased, and they are the only heirs at law of said decedent. That said Grace E. Mayo had the lawful custody and control of the said Roy A. Mayo, a minor of the age of fifteen (15) years at the time of his death hereinafter alleged. That at all times prior to his death a *mutal* relation of love and affection existed between said Roy A. Mayo and his said mother. That said Grace

E. Mayo was of the age of 48 years, September 4, 1940.

Third: That at all times herein mentioned, the Libelant in Intervention, Grace E. Mayo, was the mother of Roy A. Mayo, aged fifteen (15) years; that heretofore on or about the month of December, 1933, Libelant in Intervention, Grace E. Mayo, obtained a Final Decree of Divorce from Frank F. Mayo, at Los Angeles, California, in the Superior Court of the State of California, in and for the County of Los Angeles, case Number D-105638, wherein she was granted sole care, custody and control of said minor child, Roy A. Mayo.

Fourth: That the Motor Vessel, "Sakito Maru", is a foreign vessel and was at the time of the institution of this action within the jurisdiction of this court, to-wit: at the port of Los Angeles, California. That said Grace E. Mayo is informed and believes, and upon such information, alleges, that S. Sato was the Master and Respondent, Nippon Yusen Kabushiki Kaisya, a corporation of the Empire of Japan, was the owner thereof.

Fifth: That the fishing barge "Olympic II", was at all times herein mentioned an American vessel of which said John Doe [187] was the Master thereof, and said Hermosa Amusement Corporation, Ltd. a corporation, the owner thereof.

Sixth: That the true names of Respondents, John Doe and Richard Roe, are unknown, and that they are therefore sued by such fictitious names, and upon ascertaining said true names, leave of court will be

asked to amend said pleading to insert said true name or names.

Seventh: Upon information and belief, that the said barge "Olympic II" was a fishing barge on the high seas, and was at all times hereinafter mentioned anchored in waters beyond a marine league off the State of California, to-wit, about three and one-half nautical miles off the port of Los Angeles.

Eighth: That on September 4, 1940, at the invitation and request of the said master of the said barge "Olympic II" and the said owner, the Respondent Hermosa Amusement Corporation, Ltd., the said Roy A. Mayo was lawfully upon said barge for the purpose of fishing therefrom, and he had rendered and paid the required compensation to said master and owner for the privilege of being thereon and using the facilities thereof.

Ninth: That on said September 4, 1940, at about the hour of 7:00 A.M. said vessel, "Sakito Maru", was inward bound to the Port of Los Angeles, and was approaching the said Port of Los Angeles at or near the position of the said barge.

Tenth: That on the 4th day of September, 1940, at or about the hour of seven o'clock A.M. while the said fishing barge "Olympic II" was anchored at the Horseshoe Kelp, a point on the high seas approximately six (6) miles off the Port of Los Angeles, at which time and place the weather was misty and the visibility limited not more than one-half mile, by reason of misty and foggy weather conditions, at which time and place the said motor vessel "Sakito

Maru" was preceeding to the Port of Los Angeles at a high and excessive rate of speed; said Vessel being improperly manned [188] in that it did not have a competent and proper lookout on watch, nor did said Vessel have competent and proper officers attending to their duties, and said Vessel being so improperly, carelessly and negligently navigated and operated, that said Vessel by reason of the premises aforesaid, and because of the negligent manning and operating of said fishing barge "Olympic II", said negligence being the failure to give and maintain proper warning signals and the failure to post and notify shipping of the location of the said moored fishing barge "Olympic II", that said motor vessel "Sakito Maru", ran into and collided with the fishing barge, "Olympic II" striking and breaking her amidships. That immediately thereafter, said motor vessel, "Sakito Maru", was so negligently and carelessly operated so as to permit her to back away from the said fishing barge, "Olympic II", allowing said fishing barge, "Olympic II" to sink almost immediately.

Eleventh: That said Roy A. Mayo was aboard said barge at the time the same was so struck by the motor vessel, "Sakito Maru". Upon information and belief, that the said "Sakito Maru" and her master saw the said Roy A. Mayo aboard said barge, and saw that the same was in imminent danger of sinking, and that said motor vessel "Sakito Maru" and said master thereof were then and there requested to stand by, lower life boats, and give aid

to and rescue said Roy A. Mayo, but that said motor vessel "Sakito Maru" and said master thereof failed, refused and neglected to lower life boats, give aid as requested, and remain standing by. Upon information and belief that said motor vessel, "Sakito Maru" was then and there equipped with life boats.

Twelfth: Upon information and belief, that by reason of the neglect and fault of the master and owner of said barge "Olympic II" the same was at the time and place aforesaid in an unseaworthy condition, and the same was at said time and place negligently maintained and operated. [189]

Thirteenth: That as a direct and proximate result of the negligent operation of the said motor vessel, "Sakito Maru", and her failure to stand by and render aid, and of the said negligent operation and maintenance of the said barge "Olympic II", and the unseaworthy condition thereof, the said Roy A. Mayo was cast into the water from said barge, "Olympic II", and drowned at said time and place, to the damage of said Grace E. Mayo in the sum of Fifty Thousand (\$50,000.00) Dollars.

Fourteenth: That prior to the death, the said Roy A. Mayo was ablebodied and was capable of, and was in fact, earning Fifty-five (\$55.00) Dollars per month, which he contributed to the support of said Grace E. Mayo.

Fifteenth: On September 7, 1940, the Libel in Intervention of Grace E. Mayo was filed in the above entitled court and the Motor Vessel, "Sakito

Maru'', was by order of said court placed in the custody of the marshal thereof, and in order to obtain the release of the same, the owners thereof, to-wit, Nippon Yusen Kabushiki Kaisya, a corporation of the Empire of Japan, filed a stipulation for release in the sum of Ten Thousand (\$10,000.00) Dollars.

Sixteenth: That on or about November 1, 1940, said Grace E. Mayo, Libelant in Intervention, was duly and regularly appointed co-administrator of the Estate of Roy A. Mayo, deceased, under Probate No. 198190 in the Superior Court of Los Angeles County, State of California and is now the qualified and acting co-administrator of said Estate of Roy A. Mayo, deceased, and as such co-administrator is entitled to the benefits of said stipulation for the benefit of said parent of said Roy A. Mayo, deceased.

Seventeenth: That all and singular the premises are true and within the Admiralty and Maritime Jurisdiction of the United States and of this Honorable Court pursuant to Section 761 of Title 46, U.S.C.A.

For a Second and Separate Cause of Action, Grace E. Mayo, [190] Individually, against Said Respondents in Intervention Complains and Alleges:

First: Incorporates herein by reference to allegations of Paragraphs I, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, and XVII of the first cause of action hereinabove set forth.

Second: That although this Libelant in Intervention is informed and believes that said collision and the death of said Roy A. Mayo occurred beyond a marine league from the shore of the State of California, should this Court determine that the same occurred within the territorial waters of the State of California, then in that event she is entitled to maintain this action pursuant to the provisions of Section 376 of the Code of Civil Procedure of the State of California.

For a Third, Separate and Distinct Cause of Action, Frank F. Mayo, as Co-administrator of the Estate of Roy A. Mayo, Deceased, Against Said Respondents in Intervention, Complains and Alleges:

First: Incorporates herein by reference to allegations of Paragraphs IV, V, VI, VII, VIII, IX, X, XI, XII, XV, and XVII of the first cause of action hereinabove set forth.

Second: That the Libelant in Intervention, Frank F. Mayo, is one of the appointed, qualified and acting administrators of the Estate of Roy A. Mayo, deceased, in Probate Proceedings No. 198190, pending in the Superior Court of the State of California, in and for the County of Los Angeles.

Third: That said Frank F. Mayo, was the father of said Roy A. Mayo, deceased, and one of his heirs-at-law, and that at all times prior to his death, a mutual relation of love and affection existed between said Roy A. Mayo and his said father; that said

Frank F. Mayo, was of the age of 55 years, September 4, 1940.

Fourth: That as a direct and proximate result of the negligent operation of the said motor vessel, "Sakito Maru", and her [191] failure to stand by and render aid, and of the said negligent operation and maintenance of the said barge "Olympic II", and the unseaworthy condition thereof, the said Roy A. Mayo was cast into the water from said barge "Olympic II", and drowned at said time and place, to the damage of said Frank F. Mayo, in the sum of Twenty-five Thousand (\$25,000.00) Dollars.

For a Fourth and Separate Cause of Action, Frank F. Mayo, Individually, Against Said Respondents in Intervention, Complains and Alleges:

First: Incorporates herein by reference to allegations of Paragraphs I, II, III, and IV of the third cause of action hereinabove set forth.

Second: That although this Libelant in Intervention is informed and believes that said collision and the death of said Roy A. Mayo occurred beyond a marine league from the shore of the State of California, should this Court determine that the same occurred within the territorial waters of the State of California, then in that event he is entitled to maintain this action pursuant to the provisions of Section 376 of the Code of Civil Procedure of the State of California.

Wherefore, Libelant in Intervention, Grace E. Mayo individually and as co-administrator of the

Estate of Roy A. Mayo, deceased, prays that process in due form of law, according to the course of this Honorable Court, in cases of Admiralty and maritime jurisdiction, may issue against said Hermosa Amusement Corporation, Ltd., a California corporation, and against the said Motor Vessel, "Sakito Maru", her engines, tackle, apparel, furniture, etc., and that the said S. Sato, Master of said Vessel, and the N.Y.K. Lines and Nippon Yusen Kaisha Steamship Company, a corporation, and all other [192] persons having any right, title, or interest in said Vessel, her engines, tackle, apparel, furniture, etc., may be cited to appear and answer all the matters aforesaid, and that this Honorable Court may be pleased to decree the payment of damages to this Intervenor, individually and as co-administrator of the Estate of Roy A. Mayo, deceased, as aforesaid, in the sum of Fifty Thousand (\$50,000.00) Dollars, with costs, and that the said Vessel may be condemned and sold to pay the same, and that the Libelant in Intervention as co-administrator be permitted to share in the benefits of the bond filed by the owners of said Motor Vessel "Sakito Maru" to release the same from the custody of the Marshal of the above Court, and may have such other and further relief in the premises, as in law and justice she, individually and as co-administrator, may be entitled to receive, and Frank F. Mayo, Libelant in Intervention, individually and as co-administrator of the Estate of Roy A. Mayo, deceased, prays that process in due form of law, according to the course of this Honorable Court, in

cases of Admiralty and maritime jurisdiction, may issue against said Hermosa Amusement Corporation, Ltd., a California corporation, and against the said Motor Vessel, "Sakito Maru", her engines, tackle, apparel, furniture etc., and that the said S. Sato, Master of said Vessel, and the N.Y.K. Lines and Nippon Yusen Kaisha Steamship Company, a corporation, and all other persons having any right, title or interest in said Vessel, her engines, tackle, apparel, furniture, etc., may be cited to appear and answer all the matters aforesaid, and that this honorable Court may be pleased to decree the payment of damages to this Intervenor, individually and as co-administrator of the Estate of Roy A. Mayo, deceased, as aforesaid, in the sum of Twenty-five Thousand (\$25,000.00) Dollars, with costs, and that the said Vessel may be condemned and sold to pay the same, and that the Libelant in Intervention as co-administrator, be permitted to share in the benefits of the bond filed by the owners of said [193] Motor Vessel "Sakito Maru", to release the same from the custody of the Marshal of the above Court, and may have such other and further relief in the premises, as in law and justice he, individually and as co-administrator, may be entitled to receive.

WAYLAND & STEARNS

By FRANK L. STEARNS

Proctors for Grace E. Mayo

600 Black Building,

Los Angeles, California,

MICHIGAN 1946

DAVID I. LIPPERT

David I. Lippert, Proctor for
Frank F. Mayo,
806 Union Bank Building,
Los Angeles, California,
Michigan 7437

(Duly verified.)

[Endorsed]: Filed Feb. 6, 1941. [194]

[Title of District Court and Cause.]

ANSWER TO AMENDED LIBEL IN INTER-
VENTION OF GRACE E. MAYO AND
AND FRANK F. MAYO.

To the Honorable, the Judges of the United States
District Court for the Southern District of Cali-
fornia, Central Division:

Nippon Yusen Kabushiki Kaisya, a corporation
(sued herein under the name of N. Y. K. Lines, Nip-
pon Yusen Kaisha Steamship Co., a corporation,
and Nippon Yusen Kaisha Kabushiki, a corporation
[196] of the Empire of Japan), as respondent here-
in and as claimant for and on behalf of the respond-
ent Motor Vessel "Sakito Maru", her motors, tackle,
apparel, furniture, etc., in answer to the libel in in-
tervention filed herein by Grace E. Mayo and Frank
F. Mayo, individually and as administrators of the
estate of Roy A. Mayo, deceased, admits, denies and
alleges as follows:

As to the first cause of action of libelant in inter-

vention Grace E. Mayo, as administratrix of the estate of Roy A. Mayo:

1. Alleges claimant-respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations of Articles First, Second, Third, Sixth, Eighth, Fourteenth and Sixteenth, and therefore, on that ground, denies said allegations.

2. Answering Article Fourth, admits that the Motor Vessel "Sakito Maru" is a foreign vessel, that S. Sato was the master thereof and that respondent Nippon Yusen Kabushiki Kaisya, a corporation of the Empire of Japan, was the owner thereof at all times mentioned in said amended libel.

3. Answering Article Fifth, admits that the fishing barge "Olympic II" was at all times in said amended libel mentioned an American vessel and that Hermosa Amusement Corporation, Ltd., a corporation, was owner thereof. Alleges that the master of said "Olympic II" at all times in said amended libel mentioned was Joakim M. Andersen.

4. Answering Article Seventh, admits that on September 4, 1940, at or about the hour of 7:10 o'clock A. M., the fishing barge "Olympic II" was anchored on the high seas of the Pacific Ocean at a point approximately $3\frac{1}{2}$ nautical miles in a direction 162° true from the lighthouse at the end of the west breakwater at the entrance to Los Angeles Harbor, California. Except as [197] herein expressly admitted, denies each and every allegation of Article Seventh.

5. Answering Article Ninth, admits that at about

the hour of 7:00 o'clock A. M., the "Sakito Maru" was inward bound to the Port of Los Angeles, and alleges that said vessel was proceeding on a course of 340° true, and that approximately ten minutes later the "Sakito Maru" reached the position of the "Olympic II". Except as herein expressly admitted, denies each and every allegation of Article Ninth.

6. Answering Article Tenth, admits that on September 4, 1940, at or about the hour of 7:10 o'clock A. M., the fishing barge "Olympic II" was anchored on the high seas of the Pacific Ocean approximately 3½ nautical miles and in a direction 162° true from the lighthouse at the end of the west breakwater at the entrance to Los Angeles Harbor; admits that at said time and place the weather was misty and the visibility was limited; admits that at said time and place the "Sakito Maru" was proceeding to the Port of Los Angeles, but denies that the "Sakito Maru" was proceeding at a high or at an excessive rate of speed; denies that said vessel was improperly manned; denies that it did not have a competent and/or proper lookout on watch; denies that it did not have competent and proper officers attending to their duties; denies that it was improperly, carelessly and negligently navigated and/or operated either as alleged in the libel in intervention or otherwise; denies that by reason of the premises in the libel in intervention the "Sakito Maru" ran into and collided with the "Olympic II", but admits that the "Sakito Maru" ran into and collided with the "Olympic II", striking and breaking her amidships; admits

that said collision was caused, among other faults on her part, by the failure of the "Olympic II" to give and maintain [198] proper warning signals and by her failure to post and notify shipping of the location of the anchored "Olympic II"; denies that immediately after said collision, or at any time, the "Sakito Maru" was negligently and/or carelessly operated so as to permit her to back away from the "Olympic II", allowing the "Olympic II" to sink almost immediately, but admits said "Olympic II" did sink shortly following the collision. Except as herein expressly admitted, or otherwise denied, denies each and every allegation of Article Tenth.

7. Answering Article Eleventh, alleges claimant-respondent is without knowledge or information sufficient to form a belief as to the truth of the allegation that Roy A. Mayo was aboard the "Olympic II" when it was struck by the "Sakito Maru", and therefore, on that ground, denies said allegation; denies that the "Sakito Maru" or her master saw Roy A. Mayo aboard the "Olympic II"; admits that, following the collision, the master of the "Sakito Maru" saw the "Olympic II" was in imminent danger of sinking; admits that the "Sakito Maru" was then and there equipped with lifeboats. Except as herein expressly admitted or otherwise denied, denies each and every allegation of Article Eleventh.

8. Admits the allegations of Article Twelfth.

9. Answering Article Thirteenth, alleges claimant-respondent is without knowledge or information sufficient to form a belief as to the truth of the alle-

gation that Roy A. Mayo was cast into the water from the "Olympic II" and drowned, and therefore, on that ground, denies said allegation; admits the negligent operation and maintenance of the "Olympic II", and the unseaworthy condition thereof; denies that Grace E. Mayo has been damaged in the sum of \$50,000, or in any sum, or at all. [199] Except as herein expressly admitted or otherwise denied, denies each and every allegation of Article Thirteenth.

10. Answering Article Fifteenth, admits that on September 7, 1940, the libel in intervention of Grace E. Mayo was filed in the above-entitled Court, that the marshal thereof seized said motor vessel "Sakito Maru" under monition issued by said Court, and that claimant-respondent filed a stipulation for the release of said vessel in the sum of \$10,000. Except as herein expressly admitted, denies each and every allegation of Article Fifteenth.

11. Denies the allegations of Article Seventeenth.

As to the second separate cause of action of Grace E. Mayo, individually:

1. Answering Article First, claimant-respondent incorporates herein as though fully set forth again its admissions, denials and allegations in answer to the first cause of action of the **amended libel in intervention**.

2. Denies the allegations of Article Second.

As to the Third Separate and Distinct Cause of Action of Frank F. Mayo, as Co-administrator of the Estate of Roy A. Mayo, Deceased:

1. Answering Article First, claimant-respondent incorporates herein as though fully set forth again its admissions, denials and allegations in answer to the first cause of action of the amended libel in intervention.

2. Alleges claimant-respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations of Articles Second and Third and therefore, on that ground, denies said allegations. [200]

3. Answering Article Fourth, alleges claimant-respondent is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegation that Roy A. Mayo was cast into the water from the "Olympic II" and drowned, and therefore, and on that ground, denies said allegation; admits the negligent operation and maintenance of the "Olympic II" and the unseaworthy condition thereof; denies that Frank F. Mayo has been damaged in the sum of \$25,000, or in any sum, or at all. Except as herein expressly admitted or otherwise denied, denies each and every allegation of Article Fourth.

As to the Fourth Separate Cause of Action of Frank F. Mayo, Individually:

1. Answering Article First, claimant-respondent incorporates as though fully set forth again its admissions, denials and allegations in answer to the third cause of action of the amended libel in intervention.

2. Denies the allegations of Article Second.

Further Answering and as a First Separate and Affirmative Defense to the Amended Libel in Intervention and all Causes of Action Thereof, Claimant-Respondent Alleges:

1. At all times herein mentioned respondent, Nippon Yusen Kabushiki Kaisya, was a corporation organized and existing under the laws of the Empire of Japan and was the owner and operator of the Japanese Motor Vessel "Sakito Maru".

2. Upon information and belief that Hermosa Amusement Corporation was at all times herein mentioned, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California and was at all times the owner of the fishing barge "Olympic II", and of her tackle, apparel, [201] furniture, appurtenances and boats.

3. On September 4, 1940, while said "Sakito Maru" was bound on a voyage from New York to Yokohama via Los Angeles, said "Sakito Maru" came into collision with the fishing barge "Olympic II" then anchored on the high seas of the Pacific Ocean more than a marine league from the shore of the State of California and approximately $3\frac{1}{2}$ nautical miles distant from and in a direction 162° true from the lighthouse at the end of the west breakwater at the entrance to Los Angeles Harbor, California; that as a result of said collision the "Olympic II" and the "Sakito Maru" were each badly damaged and the "Olympic II" sank shortly following the collision.

4. Upon information and belief that said collision occurred in the following manner:

The fishing barge "Olympic II", a schooner built sixty-three years ago, was recently converted into a pleasure fishing barge. The "Olympic II" had an iron hull, was approximately two hundred thirty-eight (238) feet in length and thirty-eight (38) feet in width, with a depth of twenty-two (22) feet. Except for a bulkhead near the stem, said fishing barge had no other bulkheads, so that her lower hold was open from the bulkhead aforementioned to the stern. There were stowed in this open lower hold approximately fifteen hundred (1500) tons of ballast, consisting of gravel, sand and heavy cement blocks.

At the time of the collision aforementioned, at or about 7:10 o'clock A. M., on or about September 4, 1940, the "Olympic II", unknown to the master and officers of the "Sakito Maru", was anchored on the high seas of the Pacific Ocean more than a marine league from the shore of the State of California and approximately 3½ nautical miles distant from, and in a direction 162° true from [202] the lighthouse at the end of the west breakwater at the entrance to Los Angeles Harbor, California, without permit or license from any governmental body or agency, directly in the steamer lane for all vessels plying between Los Angeles Harbor and the Panama Canal and other ports between Los Angeles Harbor and the Panama Canal. At the time of the collision there was no person aboard said fishing barge licensed by the United States Bureau of Marine Inspection and Navigation, either in the capacity of master, officer, able bodied seaman, or ordinary seaman. At said

time there were aboard the "Olympic II" three employees of the Hermosa Amusement Corporation, Ltd., three employees in a concession or eating place aboard said fishing barge and eighteen people or passengers who had been transported to said fishing barge from the shore that morning aboard shore boats operated by the Hermosa Amusement Corporation, Ltd., for the purpose of engaging in pleasure fishing.

The "Sakito Maru" at the time of the collision was on a voyage from New York to Yokohama via the Panama Canal and Los Angeles Harbor. Until immediately prior to the collision and since noon, September 3, 1940, the "Sakito Maru" was steering a course of 340° true. For several hours prior to the events in question on September 4, 1940, there had been on the bridge of the "Sakito Maru", in charge of her navigation, the first officer and, in addition, an apprentice officer and a quartermaster, acting as helmsman. At about 7 o'clock A. M. of said day S. Sato, master of the "Sakito Maru", came up on the bridge and he and the other persons aforementioned remained on the bridge during the events hereinafter related and until and after the collision.

At 7 o'clock A. M., September 4, 1940, the "Sakito Maru" was proceeding on the course aforementioned, to-wit, 340° true, at a speed of about sixteen knots per hour, with her engines [203] at full ahead. At this time the weather was clear with practically full visibility off the starboard and port sides of the vessel and to the stern but some distance ahead of

the vessel there appeared to be a haze or mist. At about 7:03 o'clock A. M. the range of visibility ahead decreased to approximately one-half ($1\frac{1}{2}$) a mile, and at this time the speed of the vessel was reduced to slow ahead, the sounding of regulation fog signals was commenced on the whistle and an A. B. sailor took the position of lookout at the bow of the vessel. Commencing with the time aforementioned, fog signals were sounded by the apprentice officer of the "Sakito Maru" at approximately one minute intervals, each signal consisting of a single blast on the whistle of from about five (5) to six (6) seconds in duration, and these signals were continually sounded at the intervals and in the manner mentioned, until the time of the collision. During this period the master and chief officer maintained a careful watchfulness and the helmsman remained at the wheel, as aforementioned.

At about 7:09 o'clock A. M., while the "Sakito Maru" was proceeding with her engines at slow ahead, on a course of 340° true, as aforementioned, and while the master, first officer, an apprentice officer and a helmsman were on the bridge in the performance of their duties, as aforementioned, and a lookout was stationed at the bow of the vessel, as aforementioned, the lookout at the bow sighted the fishing barge "Olympic II" dead ahead of the "Sakito Maru" and lying at nearly right angles to her projected course and immediately notified the officers on the bridge of the presence of the fishing barge. Immediately thereafter the helm of the "Sak-

ito Maru" was put hard to starboard, in an effort to change the course of the "Sakito Maru" so as to clear the stern of said fishing barge, the engines were stopped and immediately thereafter put full astern [204] and three blasts were sounded on the whistle.

Because of the distance required to change the heading of a vessel of the size and nature of the "Sakito Maru", the vessel had only commenced to swing or change her heading at the time of the impact. The collision occurred at about 7:10 o'clock A. M., the stem of the "Sakito Maru" striking the port side of the fishing barge "Olympic II" nearly midship. The impact checked the forward momentum of the "Sakito Maru", and since at that time the engines were turning full astern and the propellers were in reverse motion, the "Sakito Maru" was caused to immediately gain a slight sternway and to separate from the barge. The engines were stopped at about the time of the impact but the time required to stop the propellers in their reverse motion was sufficient to permit the vessel to gain sternway and to cause her to separate from the barge immediately after the impact, as aforementioned.

Upon the "Sakito Maru" being separated from the fishing barge, the master of the "Sakito Maru" considered it would be an unwise and a hazardous undertaking to attempt to move the vessel forward again in an effort to nose the bow into the hole stove in the side of the barge, it being possible and probable that such a maneuver might have resulted in the "Sakito Maru" striking the barge in a different place or that the forward momentum could not be

checked before the fishing barge might be pushed or caused to list, thus further endangering the lives and safety of those aboard the fishing barge. Accordingly, after the "Sakito Maru" had separated from the fishing barge and her engines were stopped, the engines were again put astern and the vessel backed a sufficient distance to give safe and proper clearance for dropping anchor. While the vessel was backing for this purpose, preparations were under way for dropping the anchor and for lowering a lifeboat. The engines [205] of the "Sakito Maru", after this maneuver, were stopped at 7:15, the anchor was let go at 7:17, the engines were ordered slow ahead to check the sternway at 7:18 and the engines were then stopped again at 7:19. Immediately after the engines were stopped at 7:19 and the vessel came to rest in the water, a lifeboat was lowered at 7:20 A. M.

In the meantime the "Olympic II" had sunk and the lifeboat, after being launched, was immediately directed to the area where the barge had sunk for the purpose of locating and rescuing any persons who might be found in the water. This search was continued by the lifeboat for two hours, during which time the "Sakito Maru" remained at anchor in the position aforementioned. Before the lifeboat returned to the "Sakito Maru" a Coast Guard cutter arrived at the scene and joined with other small boats in the vicinity to search for persons who might be found in the water. When this search was unavailing and no further assistance could be rendered by

the "Sakito Maru", the vessel hoisted anchor at 11:57 A. M. and proceeded to the outer harbor of Los Angeles Harbor, where the vessel anchored until towed to shipyards for survey and temporary repairs.

At no time prior to the sighting of the fishing barge "Olympic II" by the lookout on the "Sakito Maru" were any bells, signals or other warnings from said fishing barge heard by anyone aboard the "Sakito Maru", nor were any bells, signals or other warnings from any other fishing barge or craft anchored in the vicinity of the fishing barge "Olympic II" heard by anyone aboard the "Sakito Maru".

5. At the time of said collision and at all times prior thereto, the "Sakito Maru" was proceeding at a moderate rate of speed, having careful regard to the existing circumstances and [206] conditions, was keeping a sharp lookout and in all respects complying with the rules and laws of navigation; that the "Sakito Maru" was at all times navigated with due caution and skill by the master and officers thereof, and that said collision was not caused by any fault, negligence or want of due care on the part of respondent, Nippon Yusen Kabushiki Kaisya, respondent, S. Sato, or of said "Sakito Maru", or of her officers or crew, or any of them.

6. Claimant-respondent is informed and believes that the said collision and consequent damage to the "Sakito Maru" and the loss of the "Olympic II" were entirely due to the fault of the "Olympic II" and of those in charge of that vessel, and upon such information and belief claimant-respondent alleges

that said vessel was at fault in the following, among other, particulars:

A. Said fishing barge was entirely open and unprotected by collision bulkheads in her lower hold, from a point twenty (20) feet abaft her stem, for a distance of some two hundred and eighteen (218) feet to her stern.

B. There were stowed in said open and unprotected lower hold throughout the entire length of said fishing barge, fifteen hundred (1500) tons of ballast, consisting, among other things, of rock and gravel and heavy cement blocks.

C. There was carried aboard said fishing barge, only one lifeboat, capable of accommodating only twenty persons, which was so affixed to said fishing barge that it required a boom and a winch to raise and lower said lifeboat into the water, which operation would consume at least five minutes time.

D. The "Olympic II" was grossly undermanned and incompetently manned, there being no person aboard said fishing barge as an officer or a member of the crew thereof, who held any [207] license from the Bureau of Marine Inspection and Navigation or who was experienced in navigation or who possessed an adequate or any knowledge of the rules for the prevention of collisions.

E. Although approximately three months prior to the date of said collision the owner of said fishing barge, Hermosa Amusement Corporation, Ltd., was ordered by the Bureau of Marine Inspection and Navigation to make various structural and other

changes and additions of equipment to correct the unseaworthy and unsafe condition of said fishing barge, said Hermosa Amusement Corporation, Ltd., wholly failed and neglected to make any of said changes and wholly and utterly ignored the requirements of the Bureau of Marine Inspection and Navigation. The aforesaid requirements of the Bureau of Marine Inspection and Navigation with which said Hermosa Amusement Corporation, Ltd., failed to comply included among other things the following:

(a) The structure comprising the keel, stem, sternframe, keelsons, stringers, frames, beams, decks, bulkheads, ceilings, sheathings, planking, plating, fastenings, etc., including also the frames, beams, plating or planking of superstructures, deck houses, etc., and all holds, bilges, peaks and tanks, shall be thoroughly inspected and necessary tests shall be made to determine actual conditions and suitable repairs, renewals or replacements effected where found necessary.

(b) A sufficient number of transverse watertight bulkheads shall be fitted so that the vessel will remain afloat with positive stability in the event any one main compartment is flooded.

(c) The structural strength of the vessel shall be in all respects sufficient.

(d) All spars, rigging and gear shall be placed in a [208] safe condition, or removed if unnecessary.

(e) An inclining test shall be made by a representative of the Bureau.

(f) All gangways, accommodation ladders and stairways, shall have suitable manropes on each side.

All side gangways and ladders shall be of rugged construction. All running gear such as tackles, hooks, shackles, bridles, etc., shall be of suitable dimensions and in good condition.

(g) There shall be one set of side lights suitably screened visible at least two miles.

(h) There shall be an efficient fog bell.

(i) There shall be one mechanical fog horn.

(j) There shall be a basket or other efficient signal for the purpose of indicating the side of the fishing vessel approaching vessels may pass.

(k) There shall be at least ten square feet of deck space available for each person allowed on board.

(l) A log book shall be kept in which a daily record of the number of persons on board during the day shall be entered.

(m) All bilges, holds, compartments, etc., shall be free of all rubbish, waste, oil, etc.

(n) Approved lifeboats with suitable launching arrangements and approved life rafts or buoyant apparatus, shall be carried sufficient to provide accommodations for all persons on board. Fifty percent of such accommodations may be in lifeboats, and fifty percent may be in life rafts or buoyant apparatus.

(o) There shall be floodlights on both sides of the vessel on vessels with persons on board other than crew during the night time. [209]

(p) A sufficient complement of licensed officers and certificated seamen, including lifeboatmen, shall be carried as may be required to adequately deal with

any emergency that may arise, and a licensed deck officer shall be in command of the vessel.

(q) Minimum crew while vessel is at anchor with persons other than crew shall be :

1 licensed master

1 licensed engineer

Sufficient certificated lifeboatmen to adequately launch and man all lifesaving equipment, 65% of which shall be able seamen.

F. The persons aboard said fishing barge in the employ of the Hermosa Amusement Corporation, Ltd., who were supposedly the crew thereof, were grossly incompetent, negligent and inattentive to their duties.

G. The "Olympic II" had no proper or sufficient, or any, lookout.

H. The "Olympic II" did not have an adequate or proper fog bell, or other sound-signalling device, and did not sound proper and regulation fog signals so as to provide a warning to the approaching "Sakito Maru".

I. The "Olympic II", the persons aboard said fishing barge in the employ of the Hermosa Amusement Corporation, Ltd., and the Hermosa Amusement Corporation, Ltd., were negligent and at fault in other respects as to which the claimant is not now advised, but as to which it begs leave to offer proof of, as and when advised, and to amend this answer accordingly.

7. As a result of said collision, the "Sakito Maru" was damaged and respondent and claimant, Nippon Yusen Kabushiki Kaisya, [210] as owner of said

vessel, has sustained damage for cost of repairs and for loss of use of the "Sakito Maru" in an amount which has not yet been ascertained but which is estimated at the sum of \$60,000, no part of which has been paid.

Further Answering and as a Second Separate and Affirmative Defense to the Amended Libel in Intervention and all Causes of Action Thereof, Claimant-Respondent Alleges:

The libel in intervention fails to state a cause of action within the admiralty and maritime jurisdiction of this honorable Court.

Further Answering and as a Third Separate and Affirmative Defense to the Amended Libel in Intervention and all Causes of Action Thereof, Claimant-Respondent Alleges:

The libel in intervention fails to state a cause of action under the Wrongful Death on the High Seas Act (46 U. S. C. 761) or under the California Death Statute (C. C. P. 377), or under any other federal or state death statutes, and this honorable Court is without jurisdiction in the premises.

Further Answering and as a Fourth Separate and Affirmative Defense to the Amended Libel in Intervention and to the Second and Fourth Causes of Action Thereof, Claimant-Respondent Alleges:

1. Refers to all of the Articles contained in the First Separate and Affirmative Defense herein, and by such reference incorporates said articles as a part of this Fourth Separate and Affirmative Defense as if set out here at length.

2. Upon information and belief, if Roy A. Mayo

lost his life in said collision, his death occurred upon the high seas more [211] than a marine league from the shore of and outside the territorial jurisdiction of the State of California, and that libelants in intervention Grace E. Mayo, individually, and Frank F. Mayo, individually, are not proper parties in interest to file or maintain this action and this honorable Court is without jurisdiction in the premises.

Further Answering and as a Fifth Separate and Affirmative Defense to the Amended Libel in Intervention and to the Second, Third and Fourth Causes of Action Thereof, Claimant-Respondent Alleges:

The second, third and fourth causes of action alleged in the amended libel in intervention are improperly joined and as to those causes of action the respondent Motor Vessel "Sakito Maru" has never been brought within the jurisdiction of this honorable Court in this action.

Further Answering and as a Sixth Separate and Affirmative Defense to the Amended Libel in Intervention and to all Causes of Action Thereof, Claimant-Respondent Alleges:

1. Refers to all of the Articles contained in the First Separate and Affirmative Defense herein, and by such reference incorporates said articles as a part of this Fifth Separate and Affirmative Defense as if set out here at length.

2. Upon information and belief, if Roy A. Mayo lost his life in the said collision, and if said collision was due to or contributed to by any fault or neglect on the part of the "Sakito Maru", which claimant-respondent denies as aforesaid, the death of Roy A.

Mayo was proximately caused or contributed to by carelessness, recklessness, and negligence on the part of Roy A. Mayo, in that [212] he knew or should have known that the place on the high seas of the Pacific Ocean at which the "Olympic II" was anchored and where he voluntarily went, was in the steamer lane and in a place of danger and that said barge constituted a menace to navigation, and knew or should have known that the "Olympic II" was improperly manned and equipped, and therefore should have anticipated that said fishing barge might be in collision and that he might be injured or killed thereby; alleges that Roy A. Mayo was negligent in other respects as to which claimant-respondent is not now informed but as to which it begs leave to offer proof as and when advised and to amend this answer accordingly.

Wherefore, claimant-respondent prays that the said amended libel in intervention be dismissed, and that claimant-respondent have its costs of suit herein incurred, and such other and further relief as to the Court may seem just and proper.

LILLICK, GEARY, McHOSE
& ADAMS

JOHN C. McHOSE
JAMES L. ADAMS

Proctors for Claimant-Respond-
ent

634 South Spring Street,
Los Angeles, California,
Trinity 6411. [213]

(Duly verified.) [214]

[Endorsed]: Filed May 13, 1941. [216]

In the District Court of the United States for
the Southern District of California, Central
Division.

In Admiralty—No. 1138-BH

HERMOSA AMUSEMENT CORPORATION,
LTD., a corporation,

Libelant,

vs.

THE MOTOR VESSEL "SAKITO MARU", her
engines, tackles, etc., et al.,

Respondents,

NIPPON YUSEN KABUSHIKI KAISYA, a
corporation,

Claimant and Respondent,

HERMOSA AMUSEMENT CORPORATION,
LTD., a corporation, et al,

Third Party Respondents,

GRACE E. MAYO and FRANK F. MAYO,
Libelants in Intervention.

FINAL DECREE

The above entitled cause came on regularly for
hearing on September 16th, 17th, 18th, 19th, 23rd
and 24th, 1941, Wayland & Stearns, Esqs., appear-
ing for Grace E. Mayo, Libelant in Intervention,
David I. Lippert, Esq., appearing for Frank F.
Mayo, Libelant in Intervention, and Lillick, Geary,
McHose and Adams, Esqs., appearing for Nippon

Yusen Kabushiki Kaisya, a corporation; all of the evidence both oral and documentary of Libelants in Intervention and Claimant and Respondent having been heard in open court on the sole issue of liability, the cause having been submitted to the court on September 24, 1941, the Libelants in Intervention and Claimant and Respondent submitted briefs and reply briefs to the court;

And it appearing that the court has filed, rendered and [217] adopted its memorandum of opinion on the 31st day of October, 1941, as its Findings of Fact and Conclusions of Law, and the same is made a part hereof;

That following the determination of liability further hearings on November 14th and 15th, 1941, on Libelants in Intervention death claim on the original Libel in Intervention and said Amended Libel in Intervention were had, and it was stipulated in open court by and between Proctors for Libelants in Intervention, Grace E. Mayo and Frank F. Mayo, and Proctors for Claimant and Respondent, Nippon Yusen Kabushiki Kaisya, a corporation, that said Libelants in Intervention, Grace E. Mayo and Frank F. Mayo, have and recover the sum of Forty-one Hundred (\$4100.00) Dollars as damages for the death of said Roy A. Mayo, deceased;

And it further appearing to the court that at the time of the collision, to-wit, on September 4, 1941, that Roy A. Mayo, 15 year old son of Libelants in Intervention herein, was on board the "Olympic II" as a passenger and came to his death as a result

of said collision; that Libelants in Intervention, Grace E. Mayo and Frank F. Mayo, are the duly appointed, qualified and acting administrators of the Estate of said Roy A. Mayo, deceased;

That the Hermosa Amusement Corporation, Ltd., a corporation, and J. M. Andersen, Third Party Respondents, through their respective counsel, have stipulated that the amount hereinabove recited is reasonable and a proper award for the above described damages suffered by the Libelants in Intervention occasioned by the collision of the Motor Vessel "Sakito Maru" and the Fishing Barge "Olympic II".

Now, Therefore, It Is Ordered, Adjudged and Decreed that Libelants in Intervention, Grace E. Mayo and Frank F. Mayo, have and recover of the Claimant and Respondent herein, Nippon Yusen Kabushiki Kaisya, a corporation, and its stipulators for costs and value, the sum of Forty-one Hundred (\$4100.00) Dollars, said amount [218] having been stipulated by Hermosa Amusement Corporation, Ltd., a corporation, as a reasonable and proper award for the above described damages suffered by the Libelants in Intervention occasioned by the collision of the Motor Vessel "Sakito Maru" and the Fishing Barge "Olympic II", with interest thereon at the rate of seven percent (7%) per annum from the date hereof until paid; and it is hereby further

Ordered, Adjudged and Decreed that the Libels in Intervention herein and the petition and amended

petition of the Respondent, Nippon Yusen Kabushiki Kaisya, to bring in Third Party Respondents under Admiralty Rule 56, be and each and all of the same are hereby dismissed as to the Respondents and Third Party Respondents, Hermosa Amusement Corporation, Ltd., and J. M. Andersen, owner and master, respectively, of the "Olympic II", and that said last named Respondents and Third Party Respondents have and recover their costs of said Third Party Petitioner and of the Libelants in Intervention, taxed in the sum of, (\$88.55) Dollars; and it is hereby further

Ordered, Adjudged and Decreed that within ten (10) days after the entry of this decree and notice thereof to Proctors for the parties against whom this decree runs, the stipulators for costs and value on the part of said parties cause the engagements of their respective stipulations to be performed or show cause within four (4) days after the expiration of said ten (10) days or on the first day of jurisdiction thereafter why execution should not issue against their goods, chattels and lands in accordance with the terms of their respective stipulations.

Dated : December 19, 1941.

BEN HARRISON,

District Judge.

CLUFF & BULLARD,

By CLUFF & BULLARD,

Proctors for Hermosa Amusement Corporation, Ltd., and
J. M. Andersen.

Approved as to Form:

WAYLAND & STEARNS,
By FRANK L. STEARNS,
Proctors for Libelants in
Intervention. [219]

[Endorsed]: Filed Dec. 19, 1941. [220]

In the District Court of the United States for
the Southern District of California, Central
Division

In Admiralty—No. 1138-BH

HERMOSA AMUSEMENT CORPORATION,
LTD., a Corporation,

Libelant,

vs.

THE MOTOR VESSEL "SAKITO MARU", her
engines, tackles, etc., et al,

Respondents,

NIPPON YUSEN KABUSHIKI KAISYA, a
Corporation,

Claimant and Respondent,

HERMOSA AMUSEMENT CORPORATION,
LTD., a Corporation, et al,

Third Party Respondents,

GRACE E. MAYO and FRANK F. MAYO,

Libelants in Intervention.

SATISFACTION OF FINAL DECREE

Receipt is hereby acknowledged by libelants

above-named of the sum of \$4100.00 and the further sum of \$59.79, representing interest in full on the first named amount, paid by Nippon Yusen Kabushiki Kaisya and Fidelity and Deposit Company of Maryland, in full satisfaction of the Final Decree entered herein December 19, 1941, in Min. Book 24, Page 332, in favor of Grace E. Mayo and Frank F. Mayo, libelants in intervention, and the Clerk of the above-entitled Court is hereby authorized and directed to enter satisfaction of said decree of record.

Dated: Los Angeles, California, March 4, 1942.

WAYLAND & STEARNS,

By FRANK L. STEARNS,

Proctor for Grace E. Mayo,
Libelant in Intervention.

DAVID I. LIPPERT,

Proctor for Frank F. Mayo,
Libelant in Intervention.

[221]

(Duly verified.)

[Endorsed]: Filed Mar. 25, 1942. [222]

In the District Court of the United States, for
the Southern District of California, Central
Division, in Admiralty.

No. 1148-Y

HELEN McGRATH; HELEN McGRATH, as Administratrix of the estate of PETER BER-

NARD McGRATH, deceased; HELEN McGRATH, as Special Administratrix of the estate of JAMES B. McGRATH, deceased;

Libelants,

vs.

JAPANESE MOTOR VESSEL "SAKITO MARU", her engines, tackle, apparel, furniture and equipment, NIPPON YUSEN KABUSHIKI KAISYA, a corporation, HERMOSA AMUSEMENT CORPORATION, a corporation, FIRST DOE, SECOND DOE, THIRD DOE, FIRST DOE CORPORATION, a corporation and SECOND DOE CORPORATION, a corporation,

Respondents,

NIPPON YUSEN KABUSHIKI KAISYA, a corporation,

Claimant.

AMENDED LIBEL IN REM AND IN PERSONAM FOR WRONGFUL DEATH ARISING OUT OF COLLISION

To the Honorable the Judges of the United States District Court for the Southern District of California:

The amended libel of Helen McGrath, individually, as administratrix of the estate of Peter Bernard McGrath, deceased, and as special administratrix of the estate of James B. McGrath, deceased, libellant, against the Japanese Motor Vessel "Sa-

kito Maru", her engines, tackle, apparel, furniture and equipment, Nippon Yusen Kabushiki Kaisya, a corporation, Hermosa Amusement Corporation, a corporation, First Doe, Second Doe, Third Doe, First Doe Corporation, a corporation, and Second Doe Corporation, a corporation, respondents, in a cause of damages for death at sea, civil and maritime, alleges:

FIRST CAUSE OF LIBEL [460]

I.

Peter Bernard McGrath died intestate at sea on or about September 4, 1940, under the circumstances hereinafter set forth. At the time of his death, said decedent was a resident of the County of Los Angeles, State of California, and left surviving him as his heirs at law his widow, Helen McGrath, and his minor children, Patricia McGrath and Karen McGrath.

On or about October 11, 1940, the Superior Court of the State of California, in and for the County of Los Angeles, in proceedings duly had and taken therefor in the matter of the estate of said deceased, numbered 198018 on the records of said court, duly gave and made its order, wherein and whereby libelant was appointed the administratrix of the estate of said deceased. Libelant thereupon duly qualified as such administratrix and letters of administration of the said estate were issued to her by the said Superior Court and by the Clerk thereof and libelant ever since October 11, 1940, has been

and now is the duly appointed, qualified and acting administratrix of the estate of said deceased. Said Helen McGrath, said Patricia McGrath and said Karen McGrath were, and each of them was dependent upon said Peter Bernard McGrath for their support and maintenance, and said libelant, as such administratrix of the estate of said decedent, files this libel for the benefit of said Helen McGrath, Patricia McGrath and Karen McGrath and any other person or persons who may be entitled to recover damages on account of the death of said decedent as an heir or heirs, or a dependent relative or dependent relatives of said decedent.

II.

Libelant does not know the true names of First Doe, Second Doe and Third Doe, First Doe Corporation, a corporation, and Second Doe Corporation, a corporation, and therefore designates said parties by fictitious names and prays leave to amend this libel to state their true names as soon as they are ascertained [461] by her.

III.

Respondent Motor Vessel "Sakito Maru" is a Japanese Motorship of the burden of 7126 gross tons, or thereabouts, and is now, or during the currency of process herein will be, afloat upon the navigable waters of the harbor of Los Angeles and within the jurisdiction of this court. Libelant is informed and believes, and upon such information

and belief alleges, that respondent Nippon Yusen Kabushiki Kaisya, a corporation, was and is the owner of said respondent Motor Vessel "Sakito Maru". Respondents First Doe and First Doe Corporation are joined in this libel to designate any persons that may be found to be an owner or an operator of said Motor Vessel "Sakito Maru". Libellant is informed and believes, and upon such information and belief alleges, that Nippon Yusen Kabushiki Kaisya at all times herein mentioned was and it now is a corporation organized and existing under and by virtue of the laws of the Empire of Japan, and at all times herein mentioned was and it now is doing business in the Southern District of California.

IV.

The barge "Olympic II" at all times herein mentioned and up to the time of her total loss as hereinafter alleged, was an unrigged vessel documented under the laws of the United States of America, of the burden of 1766 gross tons, or thereabouts, owned and operated by respondent Hermosa Amusement Corporation. Said respondent Hermosa Amusement Corporation was at all times herein mentioned, and it now is a corporation organized and existing under and by virtue of the laws of the State of California. Respondents Second Doe and Second Doe Corporation, a corporation, are joined in this libel to designate parties who may be proved to have had some interest in said barge at the times herein mentioned as owner or operator thereof. At

all times herein mentioned Third Doe was [462] the master of said barge "Olympic II".

V.

At all times herein mentioned said barge "Olympic II" was engaged in the business of furnishing facilities for pleasure fishing to passengers for hire and was anchored at all times herein mentioned at a point in the Pacific Ocean about $31\frac{1}{4}$ nautical miles, 162° true from the lighthouse at the end of the West Breakwater at the entrance to Los Angeles Harbor. Said point is more than a marine league from the actual shore of the State of California, but less than a marine league from the line marking the limits of San Pedro Bay, to-wit, a line drawn between Point Fermin on the west and Point Lasuen on the east. Libelant is informed and believes, and upon such information and belief alleges, that said place of anchorage of said barge was and is within the territorial waters of the State of California, but if it should be found by the court that said point is more than a marine league from the shore of California, within the meaning of the United States Statute relating to Death on the High Seas by Wrongful Act (Title 46 USCA, Section 761), libelant claims the benefit of the said statute.

VI.

On or about September 4, 1940, said Peter Bernard McGrath and his minor son, James B. McGrath, in consideration of a sum of money paid by said Peter Bernard McGrath to Hermosa Amusement Corporation and its duly authorized agents,

were conveyed by said respondent Hermosa Amusement Corporation to said barge "Olympic II" at the place of anchorage aforesaid, and were furnished a place on said barge from which to fish; and from about seven o'clock in the morning of September 4, 1940, until the collision hereinafter referred to, said Peter Bernard McGrath and said James B. McGrath were aboard said barge engaged in pleasure fishing. [463]

VII.

On or about said 4th day of September, 1940, at or about 7:10 A. M. on said day, a collision occurred between the respondent Motor Vessel "Sakito Maru" and the said barge "Olympic II" as a result of which collision said "Olympic II" was sunk and became a total loss, and said Peter Bernard McGrath and James B. McGrath were struck, bodily injured and cast into the sea and they and each of them then and there met their deaths by drowning.

VIII.

Libelant alleges on information and belief that the circumstances of said collision were as follows:

Said barge "Olympic II" was anchored, and for some months prior to the date of the collision had been anchored directly in the steamer lane at the entrance of Los Angeles Harbor; that is to say, in the path regularly taken by vessels approaching said harbor from the south. From some time prior to seven o'clock on said morning of September 4, 1940, until the time of the collision, the weather was foggy with a visibility of some 500 yards and

the sea was smooth. The said respondent Motor Vessel "Sakito Maru" at all times herein mentioned up to the time of the collision was proceeding to the port of Los Angeles on a voyage from the port of New York. Her course was about 340° true and for some time prior to sighting the barge "Olympic II" she was proceeding at a speed of about sixteen knots. Said vessel claims to have reduced her speed somewhat prior to sighting said barge "Olympic II", but at all times prior to the collision said vessel continued at a speed which was immoderate under the conditions then prevailing. Said "Sakito Maru" continued at said immoderate speed and ran into and rammed said barge "Olympic II" at a point about amidships on the barge's port side, cutting deeply into said barge. Said "Sakito Maru" immediately backed away from said barge and anchored some distance away. Said "Olympic II" immediately filled with water and sank. As a result of the Collision said Peter Bernard McGrath and James B. McGrath, [464] among others, were cast into the water and drowned. No life boats were lowered from said barge. Said "Sakito Maru" did not lower any life boat until approximately half an hour after the collision.

IX.

Libelant is informed and believes and upon such information and belief alleges that said collision and the consequent loss of the lives of Peter Bernard McGrath and James B. McGrath were due

to the negligence and gross fault of those navigating the said respondent vessel "Sakito Maru" and to the negligence and gross fault of those owning, operating and managing the said barge "Olympic II" in the following particulars, to-wit:

A. As respects the barge "Olympic II":

1. The said barge had no proper or sufficient lookout.
2. The officers and crew of said barge were incompetent, negligent and inattentive to their duties.
3. The said barge was in a grossly unseaworthy condition, without proper or adequate life-saving equipment, grossly under-manned and without competent personnel of any kind aboard.
4. Said barge was anchored at a point in the direct path of vessels approaching Los Angeles Harbor where she constituted a menace to navigation. The said place of anchorage was hazardous to those aboard said barge as well as to other vessels approaching Los Angeles Harbor.
5. The barge did not have an adequate fog bell and did not ring proper signals thereon.
6. Those in charge of the barge did not take proper steps to attempt to save the lives of the passengers immediately following the collision.
7. Those in charge of said barge were negli-

gent in other respects as to which libelant is not at present advised but as to which she begs leave to offer proof as and when advised and to amend this libel accordingly.

B. As respects the "Sakito Maru":

8. The "Sakito Maru" did not have a proper and sufficient lookout, properly stationed and attentive to his duties.
9. Her master, officers and crew were incompetent, [465] negligent, improperly stationed and inattentive to their duties.
10. She was proceeding at an immoderate rate of speed in the fog then and there prevailing.
11. She failed to stop and reverse immediately on sighting said barge.
12. She did nothing to avoid collision.
13. She failed to take immediate and proper measures on sighting said barge to alter her helm to avoid striking said barge.
14. She failed to blow proper signals when proceeding through fog.
15. She failed to take effective, immediate and efficient steps to come to the aid of those cast into the sea as a result of the collision.
16. She negligently maneuvered her engines in such manner that she drew away from said barge immediately after striking it, thus allowing said barge to sink in a very

short time, instead of keeping herself in contact with said barge and thereby causing said barge to remain afloat for a sufficient length of time to permit the rescue of those aboard.

17. She was negligent in other and further particulars of which libelant is not at present advised as to which libelant begs leave to offer proof as and when advised and to amend this libel accordingly.

X.

Said Peter Bernard McGrath at the time of his death was 32 years old and was in good health and capable of earning and did earn a large sum of money, to-wit, about Five thousand dollars (\$5,000.) per annum, and regularly devoted a large part of his earnings to the support of his dependent wife and children. Libelant is 30 years old and the minor children of libelant and said decedent, Patricia and Karen McGrath are 8 years old and 3½ years old respectively. By the death of said Peter Bernard McGrath, his widow and minor children have been deprived of their means of support, and have suffered the loss of the society and comfort of their husband and father. In recovering the body of said deceased and in and about the funeral and burial of said body, the next of kin will be caused expense, to-wit, the sum of [466] Four hundred dollars (\$400.00) or thereabouts.

XI.

By reason of the foregoing, libelant and the heirs and dependent relatives of said decedent have been damaged in the sum of One Hundred Thousand Dollars (\$100,000.) for which libelant prays reparation with interest.

XII.

Section 377 of the Code of Civil Procedure of the State of California provides as follows:

“§ 377. WHEN REPRESENTATIVES MAY SUE FOR DEATH OF ONE CAUSED BY THE WRONGFUL ACT OF ANOTHER.

When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just.”

Section 813 of the Code of Civil Procedure of the State of California provides in part as follows:

“§ 813. WHEN VESSELS, ETC., ARE LIABLE. THEIR LIABILITIES CONSTITUTE LIENS. All steamers, vessels and boats are liable:

“6. For injuries committed by them to persons or property, in this state.

“Demands for these several causes constitute liens upon all steamers, vessels, and boats, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of one year from the time the cause of action accrued.”

XIII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. [467]

SECOND CAUSE OF LIBEL

I.

Libelant is the mother of James B. McGrath, deceased. Peter Bernard McGrath, the father of said James B. McGrath, is dead. James B. McGrath at the time of his death was a minor of the age of 9½ years. He died at sea on or about September 4, 1940, under the circumstances hereinafter set forth.

II.

Libelant hereby refers to Articles II, III, IV, V, VI, VII, VIII, IX and XIII of the First Cause of Libel herein, and by such reference incorporates said articles as a part of this Second Cause of Libel as if set out here at length.

III.

Said James B. McGrath at the time of his death was in good health. Libelant is 30 years old and would have received pecuniary benefits from the earnings of James B. McGrath had he lived. Libelant has suffered by reason of his death the loss of the society and comfort of said minor son. In recovering the body of said deceased and in and about the funeral and burial of said body, libelant has been caused expense, to-wit, the sum of Four hundred dollars (\$400.), or thereabouts.

IV.

By reason of the foregoing libelant has been damaged in the sum of Twenty-five Thousand Dollars (\$25,000.), for which libelant prays reparation with interest.

V.

Section 376 of the Code of Civil Procedure of the State of California provides as follows:

“§ 376. FATHER, ETC.: MAY SUE FOR INJURY OR DEATH OF CHILD. A father (of a minor, or if the father is dead or the parents of said minor are living separate or apart and the mother of the minor then has care or custody of said minor, then) the mother, may maintain an action for the injury or death of (said) minor child, and a guardian for the injury or death of his ward, [468] when such injury or death is caused by the wrongful act or neglect of another. Such action may

be maintained against the person causing the injury, or death, or if such person be employed by another person who is responsible for his conduct, also against such other person.”

Section 813 of the Code of Civil Procedure of the State of California provides in part as follows:

“§ 813. WHEN VESSELS, ETC., ARE LIABLE. THEIR LIABILITIES CONSTITUTE LIENS. All steamers, vessels, and boats are liable:

* * *

“6. For injuries committed by them to persons or property, in this state.

“Demands for these several causes constitute liens upon all steamers, vessels, and boats, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of one year from the time the cause of action accrued.”

THIRD CAUSE OF ACTION

I.

James B. McGrath died at sea on or about September 4, 1940, under circumstances hereinafter set forth. At the time of his death said decedent was a minor of the age of 91½ years and a resident of the County of Los Angeles, State of California, and left surviving him as his heir at law his mother,

Helen McGrath. Said decedent's father, Peter Bernard McGrath, met his death in the same calamity and libelant does not know at this time who, as between said Peter Bernard McGrath and said James B. McGrath, died first. On or about October 18, 1940, the Superior Court of the State of California, in and for the County of Los Angeles, in proceedings duly had and taken therefor in the matter of the estate of said James B. McGrath, deceased, numbered 198769 on the records of said court, duly gave and made its order wherein and whereby libelant was appointed the special administratrix of the estate of said deceased, and wherein and whereby libelant was [469] authorized to commence and maintain this libel. Libelant thereupon duly qualified as such special administratrix and special letters of administration of the said estate were issued to her by the said Superior Court and by the clerk thereof, and libelant ever since October 18, 1940, has been and now is the duly appointed, qualified and acting special administratrix of the estate of said deceased. Libelant as such special administratrix files this libel for the benefit of herself as the parent of said deceased and all other persons who may be entitled to recover damages on account of the death of said decedent as his heir or heirs or dependent relative or relatives of said decedent.

II.

Libelant hereby refers to Articles II, III, IV, V, VI, VII, VIII, IX and XIII of the First Cause

of Libel herein and by such reference incorporates said articles as a part of this Third Cause of Libel as if set out here at length.

III.

Said James B. McGrath at the time of his death was in good health. Said Helen McGrath is 30 years old and would have received pecuniary benefits from the earnings of said James B. McGrath had he lived. In recovering the body of said deceased and in and about the funeral and burial of said body, said Helen McGrath has been caused expense, to-wit, the sum of Four hundred dollars (\$400.00) or thereabouts.

IV.

By reason of the foregoing said Helen McGrath and the estate of said decedent have been damaged in the sum of Twenty-five Thousand Dollars (\$25,000.00) for which libelant prays reparation with interest.

Wherefore, libelants pray that process in due form of law, according to the course of this Honorable Court in causes of [470] admiralty and maritime jurisdiction, may issue against the said Motor Vessel "Sakito Maru", her engines, tackle, apparel, furniture and equipment and that all persons having an interest therein may be cited to appear and answer upon oath all and singular the matters aforesaid; that citation in personam may issue against the respondents and each of them and that they may be required to appear and answer upon oath all

and singular the matters aforesaid and that this Honorable Court may be pleased to decree the payment by respondents and each of them of the damages aforesaid, together with interest thereon and costs of suit herein; that the said Motor Vessel "Sakito Maru" may be condemned and sold to pay the same, and that libelants may have such other and further relief in the premises as in law and justice they may be entitled to receive.

McCUTCHEN, OLNEY, MAN-
NON & GREENE,
By HAROLD A. BLACK,
FRED KELLY,
LOUCKS & BAKER,
By JOHN W. BAKER,
Proctors for Libelants.

It is hereby stipulated that the foregoing amended libel may be filed.

LILLICK, GEARY, McHOSE &
ADAMS,
By JOHN C. McHOSE,
Proctors for Claimant and
Respondent Nippon Yusen
Kabushiki Kaisya, a corpo-
ration.

It is so ordered:

JEREMIAH NETERER,
United States District Judge.

[471]

(Duly verified.)

[Endorsed]: Filed Nov. 1, 1940.

[472]

[Title of District Court and Cause.]

ANSWER TO AMENDED LIBEL OF HELEN
McGRATH, HELEN McGRATH AS AD-
MINISTRATRIX, AND HELEN McGRATH
AS SPECIAL ADMINISTRATRIX AND
INTERROGATORIES.

To the Honorable, the Judges of the United States
District Court, Southern District of California,
Central Division:

Nippon Yusen Kabushiki Kaisya, as respondent and claimant of the respondent Motor Vessel "Sakito Maru", her engines, tackle, apparel, furniture and equipment, in answer to the amended libel filed herein by Helen McGrath, Helen McGrath as Administratrix of the Estate of Peter Bernard McGrath, deceased, and Helen McGrath as Special Administratrix of the Estate of James B. McGrath, deceased, admits, denies and alleges as follows:

1) Alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations of [473] Articles I, II, VI and X of the alleged first cause of libel, and therefore and on that ground, denies said allegations.

2) Admits the allegations of Articles III and IV.

3) Answering Article V, admits that at all times mentioned in the libel, the barge "Olympic II" was engaged in the business of furnishing facilities for pleasure fishing to passengers for hire and was anchored at a point on the high seas of the Pacific Ocean about $3\frac{1}{2}$ nautical miles southeast of the

lighthouse at the end of the west breakwater at the entrance to Los Angeles Harbor. Admit that said point is more than a marine league from the actual shore of the State of California. Except as herein expressly admitted, denies each and every allegation of Article V.

4) Answering Article VII, admits that on or about September 4, 1940, at or about 7:10 o'clock A. M., on said day, a collision occurred between the respondent Motor Vessel "Sakito Maru" and the said barge "Olympic II", as a result of which collision said "Olympic II" was sunk and became a total loss. Alleges claimant-respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations that Peter Barnard McGrath and James B. McGrath were struck, bodily injured and cast into the sea and then and there met their death by drowning and therefore, and on that ground, denies said allegation.

5) Answering Article VIII, claimant-respondent is informed and believes, and upon such information and belief alleges, that the facts and circumstances of said collision are as follows:

The fishing barge "Olympic II", a schooner built sixty-three years ago, was recently converted into a pleasure fishing barge. The "Olympic II" had an iron hull, was approximately two [474] hundred thirty-eight (238) feet in length and thirty-eight (38) feet in width, with a depth of twenty-two (22) feet. Except for a bulkhead near the stem, said fishing barge had no other bulkheads, so that her lower hold was open from the bulkhead aforementioned to the

stern. There were stowed in this open lower hold approximately fifteen hundred (1,500) tons of ballast, consisting of gravel, sand and heavy cement blocks.

At the time of the collision aforementioned, at or about 7:10 o'clock A. M., on or about September 4, 1940, the "Olympic II", unknown to the master and officers of the "Sakito Maru", was anchored at a point about $3\frac{1}{2}$ nautical miles in a direction 162° true from the lighthouse at the end of the west breakwater at the entrance to Los Angeles Harbor, California, without permit or license from any governmental body or agency, directly in the steamer lane for all vessels plying between Los Angeles Harbor and the Panama Canal and other ports between Los Angeles Harbor and the Panama Canal. At the time of the collision there was no person aboard said fishing barge licensed by the United States Bureau of Marine Inspection and Navigation, either in the capacity of master, officer, able bodied seaman, or ordinary seaman. At said time there were aboard the "Olympic II" three employees of respondent, Hermosa Amusement Corporation, three employees in a concession or eating place aboard said fishing barge and eighteen people or passengers who had been transported to said fishing barge from the shore that morning aboard shore boats operated by respondent, Hermosa Amusement Corporation, for the purpose of engaging in pleasure fishing.

The "Sakito Maru", at the time of the collision, was on a voyage from New York to Yokohama via the Panama Canal and Los Angeles Harbor. Until

immediately prior to the collision and [475] since noon, September 3, 1940, the "Sakito Maru" was steering a course of 340° true. For several hours prior to the events in question on September 4, 1940, there had been on the bridge of the "Sakito Maru", in charge of her navigation, the first officer, and, in addition, an apprentice officer and a quartermaster, acting as helmsman. At about 7 o'clock A. M., of said day, S. Sato, master of the "Sakito Maru", came on the bridge and he and the other persons aforementioned remained on the bridge during the events hereinafter related and until and after the collision.

At 7 o'clock A. M., September 4, 1940, the "Sakito Maru" was proceeding on the course aforementioned, to-wit, 340° true, at a speed of about sixteen knots per hour, with her engines at full ahead. At this time the weather was clear with practically full visibility off the starboard and port sides of the vessel and to the stern but some distance ahead of the vessel there appeared to be a haze or mist. At about 7:03 o'clock A. M. the range of visibility ahead decreased to approximately one-half ($\frac{1}{2}$) a mile, and at this time the speed of the vessel was reduced to slow ahead, the sounding of regulation fog signals was commenced on the whistle and an A. B. sailor took the position of lookout at the bow of the vessel. Commencing with the time aforementioned fog signals were sounded by the apprentice officer of the "Sakito Maru" at approximately one minute intervals, each signal consisting of a single blast on the whistle of from about five (5) to six (6) seconds in

duration, and these signals were continually sounded at the intervals and in the manner mentioned, until the time of the collision. During this period the master, chief officer and lookout maintained a careful watchfulness and the helmsman remained at the wheel, as aforementioned.

At about 7:09 o'clock A. M., while the "Sakito Maru" was [476] proceeding with her engines at slow ahead, on a course of 340° true, as aforementioned, and while the master, first officer, an apprentice officer and a helmsman were on the bridge in the performance of their duties, as aforementioned, and a lookout was stationed at the bow of the vessel as aforementioned, the lookout at the bow sighted the "Olympic II" dead ahead of the "Sakito Maru" and lying at nearly right angles to her projected course and immediately notified the officers on the bridge of the presence of the fishing barge. Immediately thereafter the helm of the "Sakito Maru" was put hard to starboard, in an effort to change the course of the "Sakito Maru" so as to clear the stern of said fishing barge, the engines were stopped and put full astern and three blasts were sounded on the whistle.

Because of the distance required to change the heading of a vessel of the size and nature of the "Sakito Maru" the vessel had only commenced to swing or change her heading at the time of the impact. The collision occurred at about 7:10 o'clock A. M., the stem of the "Sakito Maru" striking the port side of the "Olympic II" nearly amidships. The impact checked the forward momentum of the

“Sakito Maru”, and since at that time the engines were turning full astern and the propellers were in reverse motion, the “Sakito Maru” was caused to immediately gain a slight sternway and to separate from the barge. The engines were stopped at about the time of the impact but the time required to stop the propellers in their reverse motion was sufficient to permit the vessel to gain sternway and to cause her to separate from the barge immediately after the impact, as aforementioned.

Upon the “Sakito Maru” being separated from the fishing barge, the master of the “Sakito Maru” considered it would be an unwise and a hazardous undertaking to attempt to move the vessel [477] forward again in an effort to nose the bow into the hole stove in the side of the barge, it being possible and probable that such a maneuver might have resulted in the “Sakito Maru” striking the barge in a different place or that her forward momentum could not be checked before the fishing barge might be pushed or caused to list, thus further endangering the lives and safety of those aboard. Accordingly, after the “Sakito Maru” had separated from the fishing barge and her engines were stopped, the engines were again put astern and the vessel backed a sufficient distance to give safe and proper clearance for dropping anchor. While the vessel was backing for this purpose, preparations were under way for dropping the anchor and for lowering a lifeboat. The engines of the “Sakito Maru”, after this maneuver, were stopped at 7:15, the anchor was let go at 7:17, the engines were ordered slow ahead to check

the sternway at 7:18, and the engines were then stopped again at 7:19. Immediately after the engines were stopped at 7:19 and the vessel came to rest in the water, a lifeboat was lowered at 7:20 A. M.

In the meantime, the "Olympic II" sank and the lifeboat after being launched, was immediately directed to the area where the barge had sunk for the purpose of locating and rescuing any persons who might be found in the water. This search was continued by the lifeboat for two hours, during which time the "Sakito Maru" remained at anchor. Before the lifeboat returned to the "Sakito Maru" a Coast Guard cutter arrived at the scene and joined with other small boats in the vicinity to search for persons who might be found in the water. When this search was unavailing and no further assistance could be rendered by the "Sakito Maru", the vessel hoisted anchor at 11:57 A. M. and proceeded to the outer harbor of Los Angeles Harbor, where the vessel anchored until towed to shipyards for survey and temporary repairs. [478]

At no time prior to the sighting of the "Olympic II" by the lookout on the "Sakito Maru" were any bells, signals or other warnings from said fishing barge heard by anyone aboard the "Sakito Maru", nor were any bells, signals, or other warnings from any other fishing barge or craft anchored in the vicinity of the fishing barge "Olympic II" heard by anyone aboard the "Sakito Maru" except as herein admitted, denies the allegations of Article VIII.

6) Answering Article IX, denies that said col-

lision was due to negligence and gross, or any, fault of those navigating the "Sakito Maru", and denies each and all of the particular allegations of negligence under the heading, "B, as respects the 'Sakito Maru' ", and numbered 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 on pages 6 and 7 of the Amended Libel. Admits that said collision and any subsequent loss of life therefrom was due to the negligence and gross fault of those owning, operating and managing the said barge "Olympic II", and admits the particular allegations of negligence under the heading, "A, as respects the barge 'Olympic II' ", and numbered 1, 2, 3, 4, 5, 6 and 7 on page 6 of the Amended Libel.

7) Admits the allegations of Article XII.

7-a) Denies the allegations of Articles XI and XIII.

8) Alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Articles I and III of the alleged second cause of libel, and therefore and on that ground, denies said allegations.

9) Answering Article II of the alleged second cause of libel, refers to and repeats all admissions, denials and allegations of the answers hereinabove to the Articles of the first cause of libel as referred to and incorporated in Article II of the second cause of libel. [479]

10) Denies the allegations of Article IV of the alleged second cause of libel.

11) Admits the allegations of Article V of the alleged second cause of libel.

12) Alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Articles I and III of the alleged third cause of libel, and therefore and on that ground, denies said allegations.

13) Answering Article II of the alleged third cause of libel, refers to and repeats all admissions, denials and allegations of the answers hereinabove to the Articles of the first cause of libel as referred to and incorporated in Article II of the alleged third cause of libel.

14) Denies the allegations of Article IV of the alleged third cause of libel.

Further Answering and as a First Separate and Affirmative Defense Claimant-Respondent Alleges:

15) At all times herein mentioned respondent, Nippon Yusen Kabushiki Kaisya, was a corporation organized and existing under the laws of the Empire of Japan and was the owner and operator of the Japanese Motor Vessel "Sakito Maru".

16) Upon information and belief that Hermosa Amusement Corporation, Ltd. was at all times herein mentioned, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California and was at all times the owner of the fishing barge "Olympic II", and of her tackle, apparel, furniture, appurtenances and boats.

17) On September 4, 1940, while said "Sakito Maru" was bound on a voyage from New York to Yokohama via Los Angeles, said "Sakito Maru" came into collision with the fishing barge "Olympic

II'', [480] then anchored on the high seas of the Pacific Ocean more than a marine league from the shore of the State of California and approximately 3½ nautical miles distant from and in a direction 162° true from the lighthouse at the end of the west breakwater at the entrance to Los Angeles Harbor, California; that as a result of said collision the "Olympic II" and the "Sakito Maru" were each badly damaged and the "Olympic II" sank shortly following the collision.

18) Refers to Article 5) hereinabove and by such reference incorporates said article as a part of this First Separate and Affirmative Defense as if set out here at length.

19) At the time of said collision and at all times prior thereto, the "Sakito Maru" was proceeding at a moderate rate of speed, having careful regard to the existing circumstances and conditions, was keeping a sharp lookout and in all respects complying with the rules and laws of navigation; that the "Sakito Maru" was at all times navigated with due caution and skill by the master and officers thereof, and that said collision was not caused by any fault, negligence or want of due care on the part of respondent, Nippon Yusen Kabushiki Kaisya, or of said "Sakito Maru", or of her officers or crew, or any of them.

20) Claimant-respondent is informed and believes that the said collision and consequent damage to the "Sakito Maru" and the loss of the "Olympic II" were entirely due to the fault of the "Olympic II" and of those in charge of that vessel, and upon

such information and belief claimant-respondent alleges that said vessel was at fault in the following, among other, particulars:

A. Said fishing barge was entirely open and unprotected by collision bulkheads in her lower hold, from a point twenty (20) feet abaft her stem, for a distance of some two hundred and eighteen [481] (218) feet to her stern.

B. There were stowed in said open and unprotected lower hold throughout the entire length of said fishing barge, fifteen hundred (1500) tons of ballast, consisting, among other things, of rock and gravel and heavy cement blocks.

C. There was carried aboard said fishing barge, only one lifeboat, capable of accommodating only twenty persons, which was so affixed to said fishing barge that it required a boom and a winch to raise and lower said lifeboat into the water, which operation would consume at least five minutes time.

D. The "Olympic II" was grossly undermanned and incompetently manned, there being no person aboard said fishing barge as an officer or a member of the crew thereof, who held any license from the Bureau of Marine Inspection and Navigation or who was experienced in navigation or who possessed an adequate or any knowledge of the rules for the prevention of collisions.

E. Although approximately three months prior to the date of said collision the owner of said fishing barge, Hermosa Amusement Corporation, Ltd., was ordered by the Bureau of Marine Inspection and Navigation to make various structural and other

changes and additions of equipment to correct the unseaworthy and unsafe condition of said fishing barge, said Hermosa Amusement Corporation, Ltd. wholly failed and neglected to make any of said changes and wholly and utterly ignored the requirement of the Bureau of Marine Inspection and Navigation. The aforesaid requirements of the Bureau of Marine Inspection and Navigation with which said Hermosa Amusement Corporation, Ltd. failed to comply included among other things the following:

(a) The structure comprising the keel, stem, sternframe, keelsons, stringers, frames, beams, decks, bulkheads, [482] ceilings, sheathings, planking, plating, fastenings, etc., including also the frames, beams, plating or planking of superstructures, deck houses, etc., and all holds, bilges, peaks and tanks shall be thoroughly inspected and necessary tests shall be made to determine actual conditions and suitable repairs, renewals or replacements effected where found necessary.

(b) A sufficient number of transverse watertight bulkheads shall be fitted so that the vessel will remain afloat with positive stability in the event any one mail compartment is flooded.

(c) The structural strength of the vessel shall be in all respects sufficient.

(d) All spars, rigging and gear shall be placed in a safe condition, or removed if unnecessary.

(e) An inclining test shall be made by a representative of the Bureau.

(f) All gangways, accommodation ladders and

stairways, shall have suitable manropes on each side. All side gangways and ladders shall be of rugged construction. All running gear such as tackles, hooks, shackles, bridles, etc., shall be of suitable dimensions and in good condition.

(g) There shall be one set of side lights suitably screened visible at least two miles.

(h) There shall be an efficient fog bell.

(i) There shall be one mechanical fog horn.

(j) There shall be a basket or other efficient signal for the purpose of indicating the side of the fishing vessel approaching vessels may pass.

(k) There shall be at least ten square feet of deck space available for each person allowed on board. [483]

(l) A log book shall be kept in which a daily record of the number of persons on board during the day shall be entered.

(m) All bilges, holds, compartments, etc., shall be free of all rubbish, waste, oil, etc.

(n) Approved lifeboats with suitable launching arrangements and approved life rafts or buoyant apparatus, shall be carried sufficient to provide accommodations for all persons on board. Fifty percent of such accommodations may be in lifeboats, and fifty percent may be in life rafts or buoyant apparatus.

(o) There shall be floodlights on both sides of the vessel on vessels with persons on board other than crew during the night time.

(p) A sufficient complement of licensed officers and certificated seamen, including lifeboatmen,

shall be carried as may be required to adequately deal with any emergency that may arise, and a licensed deck officer shall be in command of the vessel.

(q) Minimum crew while vessel is at anchor with persons other than crew on board shall be :

1 licensed master

1 licensed engineer

Sufficient certificated lifeboatmen to adequately launch and man all lifesaving equipment, 65% of which shall be able seamen.

F. The persons aboard said fishing barge in the employ of the Hermosa Amusement Corporation, Ltd., who were supposedly the crew thereof, were grossly incompetent, negligent and inattentive to their duties.

G. The "Olympic II" had no proper or sufficient, or any, lookout. [484]

H. The "Olympic II" did not have an adequate or proper fog bell, or other sound signalling device, and did not sound proper and regulation fog signals so as to provide a warning to the approaching "Sakito Maru".

I. The "Olympic II", the persons aboard said fishing barge in the employ of the Hermosa Amusement Corporation, Ltd., and the Hermosa Amusement Corporation, Ltd., were negligent and at fault in other respects as to which the claimant is not now advised, but as to which it begs leave to offer proof of, as and when advised, and to amend this answer accordingly.

Further Answering and as a Second Separate and

Affirmative Defense Claimant-Respondent Alleges:

21) Refers to all of the Articles contained in the First Separate and Affirmative Defense herein, and by such reference incorporates said articles as a part of this Second Separate and Affirmative Defense as if set out here at length.

22) Upon information and belief, if Peter Bernard McGrath and/or James B. McGrath lost their lives in said collision, their deaths occurred upon the high seas more than a marine league from the shore of and outside the territorial jurisdiction of the State of California, and that libelant is not the proper party in interest to file or maintain this action and this Honorable Court is without jurisdiction in the premises.

Wherefore, claimant-respondent prays that the said libel be dismissed, and that claimant-respondent have its costs of suit herein incurred, and such other and further relief as to the [485] Court may seem just and proper.

LILLICK, GEARY, McHOSE &
ADAMS,

JOHN C. McHOSE,

JAMES L. ADAMS,

Proctors for Claimant-

Respondent,

634 South Spring Street,

Los Angeles, California,

Trinity 3411. [486]

(Duly verified.) [487]

INTERROGATORIES PROPOUNDED TO
LIBELANT HELEN McGRATH AND
REQUIRED TO BE ANSWERED UNDER
OATH.

1) a. State the date of birth of Peter Bernard McGrath.

b. State the date of birth of James B. McGrath.

c. State the age and date of birth of Helen McGrath.

d. State the age and date of birth of Patricia McGrath.

e. State the age and date of birth of Karen McGrath.

2) a. What was the occupation in which Peter Bernard McGrath was engaged at the time of his death?

b. For how long had he been engaged in such occupation?

c. What salary or compensation did he receive?

d. State in detail the exact work done by Peter Bernard McGrath and the name of his employer and the place in which he worked at the time of his death.

e. What other occupations has decedent been engaged in during the past three years?

f. Itemize the amounts contributed to Helen McGrath by Peter Bernard McGrath per month during the period of three years prior to decedent's death.

3) Give the same information requested in Interrogatory No. 2 with respect to James B. McGrath.

4) What were the pecuniary benefits Helen McGrath expected to receive from James B. McGrath had he lived?

5) What was Peter Bernard McGrath's gross income in 1939?

6) What was Peter Bernard McGrath's gross income in 1938?

7) What was James B. McGrath's gross income in 1939?

8) What was James B. McGrath's gross income in 1938?

9) Itemize the funeral expense incurred in connection with the death of Peter Bernard McGrath. [488]

10) Itemize the funeral expense incurred in connection with the death of James B. McGrath.

Dated: November 9, 1940.

LILLICK, GEARY, McHOSE &
ADAMS,

JOHN C. McHOSE,
JAMES L. ADAMS,

Proctors for Claimant-
Respondent.

[Endorsed]: Filed Nov. 12, 1940. [489]

[Title of District Court and Cause.]

PETITION TO BRING IN THIRD PARTY
RESPONDENTS UNDER ADMIRALTY
RULE 56

To the Honorable, the Judges of the United States
District Court, for the Southern District of
California, Central Division:

The petition of Nippon Yusen Kabushiki Kaisya,
a corporation, owner of the Motor Vessel "Sakito

Maru'' and respondent and claimant herein, against Hermosa Amusement Corporation, Ltd., a corporation, J. M. Anderson, Doe One, Doe Two, Doe Three, Doe Four, Doe Five and Doe Six, in a cause of collision civil and maritime, alleges as [490] follows:

1) At all times hereinafter mentioned petitioner, Nippon Yusen Kabushiki Kaisya, was, and now is, a corporation, incorporated, organized and existing under and by virtue of the laws of the Empire of Japan; at all of said times petitioner was, and now is, the owner and operator of the Motor Vessel "Sakito Maru", her motors, tackle, apparel, furniture, etc., and that said vessel was, and now is, registered under the laws of the Empire of Japan.

2) Upon information and belief that at all times hereinafter mentioned third party respondent, Hermosa Amusement Corporation, Ltd., was, and now is, a corporation duly organized and existing under and by virtue of the laws of California and having a place of business in the County of Los Angeles, Southern District of California. Said third party respondent is named as respondent in the libel herein, but citation has not been issued and said third party respondent has not been served and has not appeared herein.

3) Petitioner is ignorant of the true names or capacities, whether individual, associate, corporate, or otherwise, of the third party respondents, Doe One, Doe Two, Doe Three, Doe Four, Doe Five and Doe Six, and therefore names said third party

respondents, and each of them, by such fictitious names, and prays that their true names and capacities, when ascertained, may be incorporated herein by appropriate amendments.

4) Upon information and belief at all times herein mentioned third party respondents were the owners and operators of the fishing barge "Olympic II", formerly a schooner, built sixty-three (63) years ago, and recently converted into a pleasure fishing barge, which was operating on the high seas off Los Angeles Harbor, California; that on or about September 5, 1940, [491] a libel was filed herein by Helen McGrath, Helen McGrath, as administratrix of the estate of Peter Bernard McGrath, deceased, and Helen McGrath, as special administratrix of the estate of James B. McGrath, deceased, against this petitioner and against the Motor Vessel "Sakito Maru" in a cause of damage, civil and maritime, alleging, among other things, on September 4, 1940, off Los Angeles Harbor, California, the "Sakito Maru" collided with and sank the fishing barge "Olympic II", causing the deaths of Peter Bernard McGrath and James B. McGrath, and that said collision was due to fault of the "Sakito Maru".

5) Petitioner alleges upon information and belief that the facts and circumstances of said collision are as follows:

The fishing barge "Olympic II", a schooner built sixty-three years ago, was recently converted into a pleasure fishing barge. The "Olympic II" had an iron hull, was approximately two hundred thirty-eight (238) feet in length and thirty-eight (38) feet

in width, with a depth of twenty-two (22) feet. Except for a bulkhead near the stem, said fishing barge had no other bulkheads, so that her lower hold was open from the bulkhead aforementioned to the stern. There were stowed in this open lower hold approximately fifteen hundred (1,500) tons of ballast, consisting of gravel, sand and heavy cement blocks.

At the time of the collision aforementioned, at or about 7:10 o'clock A. M., on or about September 4, 1940, the "Olympic II", unknown to the master and officers of the "Sakito Maru", was anchored at a point about $3\frac{1}{2}$ nautical miles in a direction 162° true from the lighthouse at the end of the west breakwater at the entrance to Los Angeles Harbor, California, without permit or license from any governmental body or agency, directly in the steamer lane for all vessels plying between Los Angeles Harbor [492] and the Panama Canal and other ports between Los Angeles Harbor and the Panama Canal. At the time of the collision there was no person aboard said fishing barge licensed by the United States Bureau of Marine Inspection and Navigation, either in the capacity of master, officer, able bodied seaman, or ordinary seaman. At said time there were aboard the "Olympic II" three employees of respondent, Hermosa Amusement Corporation, three employees in a concession or eating place aboard said fishing barge and eighteen people or passengers who had been transported to said fishing barge from the shore that morning aboard shore boats operated by respondent, Hermosa Amusement Corporation, for the purpose of engaging in pleasure fishing.

The "Sakito Maru", at the time of the collision, was on a voyage from New York to Yokohama via the Panama Canal and Los Angeles Harbor. Until immediately prior to the collision and since noon, September 3, 1940, the "Sakito Maru" was steering a course of 340° true. For several hours prior to the events in question on September 4, 1940, there had been on the bridge of the "Sakito Maru", in charge of her navigation, the first officer, and, in addition, an apprentice officer and a quartermaster, acting as helmsman. At about 7 o'clock A. M., of said day, S. Sato, master of the "Sakito Maru", came on the bridge and he and the other persons aforementioned remained on the bridge during the events hereinafter related and until and after the collision.

At 7 o'clock A. M., September 4, 1940, the "Sakito Maru" was proceeding on the course aforementioned, to-wit, 340° true, at a speed of about sixteen knots per hour, with her engines at full ahead. At this time the weather was clear with practically full visibility off the starboard and port sides of the vessel and to the stern but some distance ahead of the vessel there appeared to [493] be a haze or mist. At about 7:03 o'clock A. M. the range of visibility ahead decreased to approximately one-half ($\frac{1}{2}$) a mile, and at this time the speed of the vessel was reduced to slow ahead, the sounding of regulation fog signals was commenced on the whistle and an A. B. sailor took the position of lookout at the bow of the vessel. Commencing with the time aforementioned fog signals were sounded by the apprentice

officer of the "Sakito Maru" at approximately one minute intervals, each signal consisting of a single blast on the whistle of from about five (5) to six (6) seconds in duration, and these signals were continually sounded at the intervals and in the manner mentioned, until the time of the collision. During this period the master, chief officer and lookout maintained a careful watchfulness and the helmsman remained at the wheel, as aforementioned.

At about 7:09 o'clock A. M., while the "Sakito Maru" was proceeding with her engines at slow ahead, on a course of 340° true, as aforementioned, and while the master, first officer, an apprentice officer and a helmsman were on the bridge in the performance of their duties, as aforementioned, and a lookout was stationed at the bow of the vessel as aforementioned, the lookout at the bow sighted the "Olympic II" dead ahead of the "Sakito Maru" and lying at nearly right angles to her projected course and immediately notified the officers on the bridge of the presence of the fishing barge. Immediately thereafter the helm of the "Sakito Maru" was put hard to starboard, in an effort to change the course of the "Sakito Maru" so as to clear the stern of said fishing barge, the engines were stopped and put full astern and three blasts were sounded on the whistle.

Because of the distance required to change the heading of a vessel of the size and nature of the "Sakito Maru", the [494] vessel had only commenced to swing or change her heading at the time of the impact. The collision occurred at about 7:10

o'clock A. M., the stem of the "Sakito Maru" striking the port side of the "Olympic II" nearly amidships. The impact checked the forward momentum of the "Sakito Maru", and since at that time the engines were turning full astern and the propellers were in reverse motion, the "Sakito Maru" was caused to immediately gain a slight sternway and to separate from the barge. The engines were stopped at about the time of the impact but the time required to stop the propellers in their reverse motion was sufficient to permit the vessel to gain sternway and to cause her to separate from the barge immediately after the impact, as aforementioned.

Upon the "Sakito Maru" being separated from the fishing barge, the master of the "Sakito Maru" considered it would be an unwise and a hazardous undertaking to attempt to move the vessel forward again in an effort to nose the bow into the hole stove in the side of the barge, it being possible and probable that such a maneuver might have resulted in the "Sakito Maru" striking the barge in a different place or that her forward momentum could not be checked before the fishing barge might be pushed or caused to list, thus further endangering the lives and safety of those aboard. Accordingly, after the "Sakito Maru" had separated from the fishing barge and her engines were stopped, the engines were again put astern and the vessel backed a sufficient distance to give safe and proper clearance for dropping anchor. While the vessel was backing for this purpose, preparations were under way for dropping the anchor and for lowering a lifeboat.

The engines of the "Sakito Maru", after this maneuver, were stopped at 7:15, the anchor was let go at 7:17, the engines were ordered slow ahead to check the sternway at 7:18, and the engines were then stopped again at 7:19. [495] Immediately after the engines were stopped at 7:19 and the vessel came to rest in the water, a lifeboat was lowered at 7:20 A. M.

In the meantime, the "Olympic II" sank and the lifeboat, after being launched, was immediately directed to the area where the barge had sunk for the purpose of locating and rescuing any persons who might be found in the water. This search was continued by the lifeboat for two hours, during which time the "Sakito Maru" remained at anchor. Before the lifeboat returned to the "Sakito Maru" a Coast Guard cutter arrived at the scene and joined with other small boats in the vicinity to search for persons who might be found in the water. When this search was unavailing and no further assistance could be rendered by the "Sakito Maru", the vessel hoisted anchor at 11:57 A. M. and proceeded to the outer harbor of Los Angeles Harbor, where the vessel anchored until towed to shipyards for survey and temporary repairs.

At no time prior to the sighting of the "Olympic II" by the lookout on the "Sakito Maru" were any bells, signals or other warnings from said fishing barge heard by anyone aboard the "Sakito Maru", nor were any bells, signals or other warnings from any other fishing barge or craft anchored in the vicinity of the fishing barge "Olympic II" heard by anyone aboard the "Sakito Maru".

6) The "Sakito Maru" committed no fault or negligence in the premises and upon information and belief the said collision was solely due to and proximately caused by the carelessness and negligence of the fishing barge "Olympic II" and third party respondents in the following respects:

A. The fishing barge "Olympic II" was negligently, recklessly and unnecessarily anchored at a point about 3½ miles outside the main entrance to Los Angeles-Long Beach Harbor, directly in the steamer lane of vessels approaching Los Angeles-Long Beach Harbor [496] from the south so as to constitute a dangerous menace to navigation, particularly during foggy and misty weather as prevailed at the time of the collision, and so as to endanger the safety not only of the barge itself and all persons aboard, but the safety of all vessels approaching Los Angeles-Long Beach Harbor from the south in such regular steamer lane.

B. Despite the fact that said fishing barge constituted a dangerous menace to navigation for the reasons and in the manner aforementioned and that the third party respondents knew said fishing barge was anchored in said regular steamer lane, the third party respondents utterly failed and neglected to furnish any notice or to cause any notice to be furnished to mariners or masters of vessels of the location of said fishing barge.

C. The "Olympic II" did not have an adequate or proper fog bell, or other sound signalling device, and did not sound proper and regulation fog signals

so as to provide a warning to the approaching "Sakito Maru".

D. The "Olympic II" was grossly undermanned and incompetently manned, there being no person aboard said fishing barge as an officer or a member of the crew thereof, who held any license from the United States Bureau of Marine Inspection and Navigation, or who was experienced in navigation or who possessed an adequate or any knowledge of the rules for the prevention of collisions.

E. The "Olympic II" was in a grossly unseaworthy and unsafe condition in the following particulars, among others:

(a) Said fishing barge was entirely open and unprotected by collision bulkheads in her lower hold, from a point twenty (20) feet abaft her stem, for a distance of some two hundred eighteen (218) feet to her stern.

(b) There were stowed in said open and unprotected [497] lower hold throughout the entire length of said fishing barge, fifteen hundred (1500) tons of ballast, consisting, among other things, of rock and gravel and heavy cement blocks.

(c) There was carried aboard said fishing barge only one lifeboat, capable of accommodating only twenty persons, which was so affixed to said fishing barge that it required a boom and a winch to raise and lower said lifeboat into the water, which operation would consume at least five minutes time.

F. Although approximately three months prior to the date of said collision the third party respondent, Hermosa Amusement Corporation, Ltd., was

ordered by the Bureau of Marine Inspection and Navigation to make various structural and other changes to correct the unseaworthy and unsafe condition of said fishing barge, said third party respondent, Hermosa Amusement Corporation, Ltd., wholly failed and neglected to make any of said changes and wholly and utterly ignored the requirements of the Bureau of Marine Inspection and Navigation. The aforesaid requirements of the Bureau of Marine Inspection and Navigation, with which said third party respondent, Hermosa Amusement Corporation, Ltd., failed to comply, included, among other things, the following:

(a) The structure comprising the keel, stem, sternframe, keelsons, stringers, frames, beams, decks, bulkheads, ceilings, sheathings, planking, plating, fastenings, etc., including also the frames, beams, plating or planking of superstructures, deck houses, etc., and all holds, bilges, peaks and tanks, shall be thoroughly inspected and necessary tests shall be made to determine actual conditions and suitable repairs, renewals or replacements effected where found necessary.

(b) A sufficient number of transverse watertight bulkheads shall be fitted so that the vessel will remain afloat [498] with positive stability in the event any one main compartment is flooded.

(c) The structural strength of the vessel shall be in all respects sufficient.

(d) All spars, rigging and gear be placed in a safe condition, or removed if unnecessary.

(e) An inclining test shall be made by a representative of the Bureau.

(f) All gangways, accommodation ladders and stairways, shall have suitable manropes on each side. All side gangways and ladders shall be of rugged construction. All running gear such as tackles, hooks, shackles, bridles, etc. shall be of suitable dimensions and in good condition.

(g) There shall be one set of side lights suitably screened, visible at least two miles.

(h) There shall be an efficient fog bell.

(i) There shall be one mechanical fog horn.

(j) There shall be a basket or other efficient signal for the purpose of indicating the side of the fishing vessel approaching vessels may pass.

(k) There shall be at least ten square feet of deck space available for each person allowed on board.

(l) A log book shall be kept in which a daily record of the number of persons on board during the day shall be entered.

(m) All bilges, holds, compartments, etc., shall be free of all rubbish, waste, oil, etc.

(n) Approved lifeboats with suitable launching arrangements and approved life rafts or buoyant apparatus, shall be carried sufficient to provide accommodations for all persons on board. Fifty percent of such accommodations may be in lifeboats, [499] and fifty percent may be in life rafts or buoyant apparatus.

(o) There shall be floodlights on both sides of the vessel on vessels with persons on board other than crew during the night time.

(p) A sufficient complement of licensed officers and certificated seamen, including lifeboatmen, shall be carried as may be required to adequately deal with any emergency that may arise, and a licensed deck officer shall be in command of the vessel.

(q) The minimum crew while vessel is at anchor with persons other than crew on board shall be:

1 licensed master

1 licensed engineer

Sufficient certificated lifeboatmen to adequately launch and man all lifesaving equipment, 65% of which shall be able seamen.

G. The persons aboard said fishing barge in the employ of third party respondent, Hermosa Amusement Corporation, Ltd., who were supposedly the crew thereof, were grossly incompetent, negligent and inattentive to their duties.

H. The "Olympic II" had no proper or sufficient, or any, lookout.

I. The "Olympic II", the persons aboard said fishing barge in the employ of the third party respondent, Hermosa Amusement Corporation, Ltd., and the third party respondent, Hermosa Amusement Corporation, Ltd., were negligent and at fault in other respects as to which petitioner is not now advised, but as to which it begs leave to offer proof of, as and when advised, and to amend this petition accordingly.

(7) If petitioner is under any liability by reason of matters alleged in the amended libel, which petitioner hereby denies, [500] then any and all such

liability was caused by the fault and negligence of third party respondents as hereinabove alleged and all such liability should be borne by third party respondents instead of petitioner and third party respondents should be proceeded against directly in this Court by libelant.

(8) Petitioner files herewith the customary stipulation for petitioner's costs as required by the rules and practice of this Court.

(9) Petitioner files its answer herein herewith and has obtained the consent of the Court to the filing of this petition.

(10) All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, petitioner prays that a citation in due form of law may issue against third party respondents herein, citing them, and each of them, to appear and answer all and singular the matters set forth in this petition and in the amended libel herein and that third party respondents may be proceeded against as if originally made parties herein and that if said third party respondents cannot be found in this district their goods and chattels within this district may be attached to the amount sued for in the libel herein, and if the Court should find that libelant is entitled to a decree then that said decree be entered against third party respondents herein and that the amended libel be dismissed as against petitioner with costs and that petitioner have

such other and further relief in the premises as to the Court may seem just.

LILLICK, GEARY, McHOSE &
ADAMS

JOHN C. McHOSE

JAMES L. ADAMS

Proctors for Petitioner
634 South Spring Street
Los Angeles, California
Trinity 3411 [501]

(Duly verified.)

Good cause appearing therefor,

It Is Ordered that petitioner may file the above petition herein, impleading third party respondents above named under the 56th Admiralty Rule of the Supreme Court.

LEON R. YANKWICH

United States District Judge.

[Endorsed]: Filed Nov. 12, 1940. [502]

[Title of District Court and Cause.]

ANSWER OF HERMOSA AMUSEMENT CORPORATION, LTD., AND J. M. ANDERSEN, RESPONDENTS AND THIRD PARTY RESPONDENTS TO FIRST AMENDED LIBEL AND THIRD PARTY PETITION.

To the Honorable, the Judges of the United States District Court, for the Southern District of California:

Answering the amended libel of Helen McGrath, et al, these respondents allege: [503]

I.

These respondents allege that they have no knowledge or information as to the following matters and things alleged in the First Amended Libel, and therefore deny each and all of the same and demand strict proof thereof from the libelants:

First cause of libel: all of the allegations of Articles I, VI, X and XI.

Second cause of libel: all of the allegations of Articles I, III and IV.

Third cause of libel: all of the allegations of Articles I, III and IV.

II.

These respondents admit that at the times mentioned in the Amended Libel, Hermosa Amusement Corporation, Ltd., was the sole owner and operator of the fishing barge "Olympic II"; that J. M. Andersen was the master thereof; that on September 4, 1940, said barge was anchored at a point in the Pacific Ocean approximately 31½ miles southeast of the west breakwater light, Los Angeles Harbor, bearing 162° true therefrom, and was there engaged in the business of furnishing fishing facilities to patrons for hire; and that on September 4, 1940, at about 7:10 A. M., the "Olympic II" was run down and sunk by the respondent Motor Vessel "Sakito Maru" with the loss of several lives.

III.

These respondents deny that the barge "Olympic II" was anchored directly or at all in any steamer lane approaching Los Angeles Harbor, and allege that she was anchored on the open sea and on a well known and well established fishing ground; deny,

for lack of information and belief, that either the said Peter Bernard McGrath or James B. McGrath was cast into the waters or drowned; admit that no lifeboat was launched from the "Olympic II", [504] and allege that at the time of the collision two powered vessels were alongside the "Olympic II" or nearly so, each capable of taking on board everyone on the "Olympic II", and that the lowering of a lifeboat from the "Olympic II" would have accomplished no purpose; deny that the collision or the death of or injury to any person, or the loss of any property consequent thereon, was due to any fault or negligence of these respondents or either of them, or of anyone managing or operating the "Olympic II" in any of the respects set forth in Article IX of the first cause of libel or otherwise, and allege that the collision and all loss of life, personal injuries and loss of or damage to property resulting therefrom were due to the faults and negligence of the respondent motor vessel "Sakito Maru" in the several respects set forth in Article IX of the Amended Libel and other respects which these respondents will prove at the trial.

IV.

These respondents allege, upon information and belief, that if either the said Peter Bernard McGrath or James B. McGrath met his death as a result of the collision, the death of such person was caused or contributed to by the fault, negligence and lack of due care of such deceased person in respects not now known to these respondents, but as to which these respondents will offer proof when

ascertained and ask leave to amend this answer accordingly.

V.

These respondents allege that on September 4, 1940, the "Olympic II", owned and operated by the respondent, Hermosa Amusement Corporation, Ltd., was anchored at the place aforesaid, and was engaged in the business and adventure of furnishing fishing facilities to patrons; and that the said owner respondent used due diligence to make and maintain the said "Olympic II", [505] her equipment and personnel in all respects seaworthy, sufficient and efficient for the purpose and adventure in which she was engaged. Following the collision the "Olympic II" sank and became and remains, with her equipment, a total loss, and the said adventure terminated at or about 7:15 A. M. on September 4, 1940, at the place of anchorage aforesaid. The value of the strippings of the "Olympic II" and of her freight then pending and of the interest of the said owner respondent therein did not and does not exceed the sum of \$415.85. The amount claimed by each of the libelants herein exceeds the value of the said owner respondent's interest in the said "Olympic II" and her freight then pending, and other suits, claims and demands arising out of the said collision are being asserted against the said owner respondent in sums aggregating more than \$500,000.00. The said collision and all loss and damage consequent thereon were done and occasioned without the consent or privity or knowledge or design of the said owner respondent, and without admitting any liability for any consequences of the

said collision, said owner respondent claims the benefit of limitation of liability as by the Acts of Congress of the United States provided.

VI.

And for answer to the third party petition of the claimant, Nippon Yusen Kabushiki Kaisya, herein, these respondents refer to their answer to the third party petition of said Nippon Yusen Kabushiki Kaisya filed in cause No. 1138-BH, an allied cause arising out of the said collision, pending in this court, and incorporate said allegations in this answer with like force and effect as if set forth herein at length.

Wherefore, these respondents pray that the First Amended Libel and the Third Party Petition be dismissed as to these res- [506] pondents, with costs to these respondents, and that these respondents have such other and further relief as in law and justice they may be entitled to receive.

ALFRED T. CLUFF,
HUGH B. ROTCHFORD,
GEORGE H. MOORE,
CLUFF & BULLARD,

Proctors for Hermosa Amusement Corporation, Ltd. and
J. M. Andersen, respondents.

403 West 8th Street,
Los Angeles, California.
VAndike 9183. [507]

(Duly verified.)

[Endorsed]: Filed Sept. 15, 1941. [508]

In the District Court of the United States, Southern District of California, Central Division.

In Admiralty—No. 1148-BH

HELEN McGRATH; HELEN McGRATH, as Administratrix of the estate of PETER BERNARD McGRATH, deceased; HELEN McGRATH, as Special Administratrix of the estate of JAMES B. McGRATH, deceased,
Libelants,

vs.

Japanese Motor Vessel SAKITO MARU, her engines, tackle, apparel, furniture and equipment, NIPPON YUSEN KABUSHIKI KAISYA, a corporation, HERMOSA AMUSEMENT CORPORATION, a corporation, FIRST DOE, SECOND DOE, THIRD DOE, FIRST DOE CORPORATION, a corporation, and SECOND DOE CORPORATION, a corporation,

Respondents,

NIPPON YUSEN KABUSHIKI KAISYA, a corporation,

Claimant.

FINAL DECREE FOR LIBELANTS [509]

This cause was heard as to the issue of liability, in consolidation with various other libels and claims arising out of a collision on September 4, 1940, of the Motor Vessel Sakito Maru and the fishing vessel Olympic II, on the 16th day of September, 1941, upon the pleadings and proofs, and was tried on the

16, 17, 18, 19, 23 and 24 of September, 1941, and was argued and submitted by the proctors of the respective parties, and the Court, after due deliberation, rendered its opinion in writing on October 31, 1941, finding the said Sakito Maru solely at fault for said collision.

Thereafter this cause having come on regularly to be heard on November 14, 1941, for the presentation of evidence with respect to the amount of damages recoverable, Harold A. Black, Messrs. McCutchen, Olney, Mannon & Greene and Fred F. Kelley, appearing for libelants, James L. Adams and Messrs. Lillick, Geary, McHose & Adams appearing for respondent, claimant and petitioner Nippon Yusen Kabushiki Kaisya and Alfred T. Cluff and Messrs. Cluff & Bullard appearing for respondent Hermosa Amusement Company, and evidence oral and documentary, having been introduced, the Court finds:

1. That libelant Helen McGrath ever since October 11, 1940, was and now is the duly appointed, qualified and acting administratrix of the estate of Peter Bernard McGrath, deceased.

2. That said Peter Bernard McGrath died intestate on or about September 4, 1940, by drowning, as a result of said collision between the said Sakito Maru and the said Olympic II.

3. That said Peter Bernard McGrath left surviving him as his heirs at law, his widow, Helen McGrath, [510] and his minor children, Patricia McGrath and Karen McGrath.

4. That said Peter Bernard McGrath at the time of his death was 32 years old, was in good health and capable of earning and did earn approximately \$3600 per annum and regularly devoted a large part of his earnings to the support of his wife and children.

5. That said Helen McGrath was 30 years old at the time of the death of said decedent and that the said minor children Patricia and Karen were eight years old and three and one-half years old, respectively.

6. That by the death of said Peter Bernard McGrath, his said widow and minor children have been deprived of their means of support and have suffered the loss of the society and comfort of their husband and father.

7. That libelant Helen McGrath is the mother of James B. McGrath, deceased.

8. That Peter Bernard McGrath, the father of said James B. McGrath, is dead; that said James B. McGrath at the time of his death, was a minor of the age of nine and one-half years.

9. That said James B. McGrath met his death by drowning on or about September 4, 1940, as a result of said collision between the said Sakito Maru and said Olympic II.

10. That said James B. McGrath at the time of his death was in good health.

11. That libelant Helen McGrath would have received pecuniary benefits from the earnings of said James B. McGrath had he lived. [511]

12. That libelant Helen McGrath has suf-

ferred damages by reason of the death of said James B. McGrath on account of the loss of the society and comfort of said minor son.

Thereafter on November 18, 1941, libelants and respondent, claimant and petitioner Nippon Yusen Kabushiki Kaisya stipulated in open court that the amount of damages recoverable by libelant Helen McGrath, as administratrix of the estate of Peter Bernard McGrath, deceased, on account of the death of said Peter Bernard McGrath is Seventeen Thousand (17,000) Dollars, and the Court finds that said amount is reasonable. That said parties also stipulated in open court on November 18, 1941, that the amount of damages recoverable by libelant Helen McGrath on account of the death of James B. McGrath, deceased, is Three Thousand (3,000) Dollars and the Court finds that said amount is reasonable, and it having been stipulated between said respondent, claimant and third party petitioner, Nippon Yusen Kabushiki Kaisya and third party respondents, Hermosa Amusement Corporation and J. M. Anderson, without prejudice to any other matter, that the foregoing amounts of \$17,000 and \$3,000 awarded libelants as damages are reasonable;

Now, Therefore, it is Hereby Ordered, Adjudged and Decreed: (1) that libelant Helen McGrath, as administratrix of the estate of Peter Bernard McGrath, deceased, recover by reason of the death of said Peter Bernard McGrath, of and from the Japanese Motor Vessel Sakito Maru, her engines, tackle, apparel, furniture and equipment, from Nippon Yusen Kabushiki Kaisya, a corporation, claimant of said vessel, and respondent herein, and from Fi-

delity and Deposit Company of Maryland, a [512] corporation, said claimant's stipulator for value, the sum of \$17,000, with interest therein until paid, at the rate of 7% per annum, but without costs.

(2) That libelant Helen McGrath recover by reason of the death of James B. McGrath, deceased, of and from the Japanese Motor Vessel Sakito Maru, her engines, tackle, apparel, furniture and equipment, from Nippon Yusen Kabushiki Kaisya, a corporation, claimant of said vessel, and respondent herein, and from Fidelity and Deposit Company of Maryland, a corporation, said claimant's stipulator for value the sum of \$3,000, with interest thereon until paid, at the rate of 7% per annum, but without costs.

(3) That the libel be dismissed as against respondent Hermosa Amusement Corporation, a corporation, and J. M. Anderson, and that the third party petition of Nippon Yusen Kabushiki Kaisya against Hermosa Amusement Corporation, et al., be likewise dismissed and that said Hermosa Amusement Corporation and said J. M. Anderson recover from libelants and from petitioner Nippon Yusen Kabushiki Kaisya, a corporation, and from their and each of their stipulators for costs, its costs as taxed herein, at \$62.52.

(4) That the opinion of this Court heretofore filed herein on October 31, 1941, as supplemented by the findings and conclusions set forth in this decree, be and hereby are adopted as the Court's findings of fact and conclusions of law pursuant to Supreme Court Rule 46½.

(5) That unless this decree be satisfied within

ten days after the entry thereof and notice to claimant, respondent and petitioner, Nippon Yusen Kabushiki Kaisya, or its proctors, James L. Adams and Messrs. Lillick, Geary, McHose & Adams, the stipulators for costs and for value on the part of [513] said respondent, claimant and petitioner, Nippon Yusen Kabushiki Kaisya, cause the engagement of their stipulations to be performed within such time, or show cause within four days after the expiration of said ten days why execution should not issue against their goods, chattels and lands to enforce satisfaction of this decree.

BEN HARRISON,

United States District Judge.

Dated: December 19, 1941.

Approved as to form as provided in Rule 126 and old Rule 44.

ALFRED T. CLUFF,

CLUFF & BULLARD,

Proctors for Respondent

Hermosa Amusement Corporation and J. M. Anderson.

[Endorsed]: Filed and entered Dec. 19, 1941.

[Endorsed]: Judgment satisfied 3/5, 1942 by filing satisfaction of Judgment.

R. S. ZIMMERMAN,

Clerk U. S. District Court,

Southern District of California.

By C. A. SIMMONS,

Deputy. [514]

In the District Court of the United States, Southern
District of California, Central Division.

In Admiralty—No. 1148-Y.

HELEN McGRATH; HELEN McGRATH, as Ad-
ministratrix of the estate of PETER BER-
NARD McGRATH, deceased; HELEN Mc-
GRATH, as Special Administratrix of the es-
tate of JAMES B. McGRATH, deceased,
Libelants,

vs.

JAPANESE MOTOR VESSEL “SAKITO
MARU”, her engines, tackle, apparel, furniture
and equipment, NIPPON YUSEN KABU-
SHIKI KAISYA, a corporation, HERMOSA
AMUSEMENT CORPORATION, a corpora-
tion, FIRST DOE, SECOND DOE, THIRD
DOE, FIRST DOE CORPORATION, a cor-
poration, and SECOND DOE CORPORA-
TION, a corporation,

Respondents,

NIPPON YUSEN KABUSHIKI KAISYA, a
corporation,

Claimant.

SATISFACTION OF JUDGMENT AND FINAL DECREE

Know All Men by These Presents:

Full satisfaction of the final decree entered herein
December 19, 1941, in Minute Book 24, at page 346,

is hereby acknowledged. Said decree is in favor of libelant, Helen McGrath, as Administratrix of the estate of Peter Bernard McGrath, deceased, [515] against Respondent Japanese motor vessel, Sakito Maru, her engines, tackle, apparel, furniture and equipment, Nippon Yusen Kabushiki Kaisya, a corporation, claimant of said vessel, and Fidelity and Deposit Company of Maryland, a corporation, claimant's stipulator for value, in the amount of \$17,000, with interest therein until paid at the rate of 7% per annum, but without costs. Said decree is also in favor of libelant, Helen McGrath against said respondent Sakito Maru, said claimant, Nippon Yusen Kabushiki Kaisya, and said stipulator, Fidelity & Deposit Company of Maryland, in the amount of \$3,000, with interest thereon until paid at the rate of 7% per annum, also without costs. The Clerk of the above entitled court is hereby authorized and directed to enter of record in said action the satisfaction of said final decree, the same having been fully paid, satisfied and discharged.

Dated: Los Angeles, California, March 5, 1942.

JOHN W. BAKER,
FREDERICK F. KELLEY,
McCUTCHEN, OLNEY, MAN-
NON & GREENE,
HAROLD A. BLACK,

Proctors for Libelants. [516]

(Duly verified.)

[Endorsed]: Filed Mar. 5, 1942. [517]

[Title of District Court and Cause.]

MOTION OF RECEIVER IN BANKRUPTCY
TO INTERVENE [678]

Comes now Sterling Carr, receiver in bankruptcy of Nippon Yusen Kabushiki Kaisya, a corporation and alleged bankrupt, and hereby moves the above entitled court for leave to enter his appearance and intervene in behalf of said alleged bankrupt and its estate in the above entitled cause through his undersigned special counsel.

This motion is made upon the grounds that such action is necessary for the proper protection of the interests of said alleged bankrupt and its estate.

This motion is based upon orders entered by the United States District Court for the Northern District of California in that certain proceedings in bankruptcy numbered 34889-W, authenticated copies of which will be produced upon the presentation of this motion, and upon the pleadings and record of the clerk of the above entitled court in the above entitled cause.

Dated: May 2, 1942.

LILLICK, GEARY, McHOSE
& ADAMS

IRA S. LILLICK

Special Counsel for Said Receiver in Bankruptcy

[Endorsed]: Filed May 4, 1942. [679]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO INTERVENE
BY RECEIVER IN BANKRUPTCY [680]

Upon considering the motion of Sterling Carr, receiver in bankruptcy of Nippon Yusen Kabushiki Kaisya, a corporation and alleged bankrupt, and good cause appearing therefor,

It Is Hereby Ordered that said Sterling Carr, receiver in bankruptcy of said Nippon Yusen Kabushiki Kaisya, an alleged bankrupt, may enter his appearance and intervene in behalf of said alleged bankrupt and its estate in the above entitled cause.

Dated: May 4, 1942.

BEN HARRISON

U. S. District Judge

[Endorsed]: Filed May 4, 1942. [681]

[Title of District Court and Cause.]

PETITION FOR APPEAL [682]

To the Honorable Ben Harrison, Judge of the United States District Court, Southern District of California, Central Division:

Your petitioners, Nippon Yusen Kabushiki Kaisya, a corporation, respondent, claimant, cross-libelant and the petitioner under the 56th Admiralty Rule in the above entitled cause, Fidelity and Deposit Company of Maryland, a corporation, stipulator for value and costs herein, and Sterling Carr, receiver in bankruptcy of said Nippon Yusen Kabushiki Kaisya, pray that they may be permitted to take an appeal

from the final decree entered in the above cause on March 17, 1942, to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herewith.

Your petitioners, and each of them, desire that said appeal shall operate as a supersedeas and therefore pray that an order be entered adopting and approving the stipulation and bond for release heretofore filed herein as a supersedeas bond and as good and sufficient security in such respect.

Your petitioners, and each of them also request that the stipulation for costs heretofore filed in the above cause, including that filed in conjunction with said petition under the 56th Admiralty Rule and the bond for costs on appeal filed herewith be adopted and approved as good and sufficient security.

Dated: Los Angeles, California, May 5, 1942.

LILLICK, GEARY, McHOSE
& ADAMS

IRA S. LILLICK

JAMES L. ADAMS

Proctors for Petitioners

[Endorsed]: Filed May 5, 1942. [683]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS [684]

Now come Nippon Yusen Kabushiki Kaisya, a corporation, appellant and respondent, claimant, cross-libelant and petitioner under the 56th Admiralty Rule in the above entitled cause, Fidelity and

Deposit Company of Maryland, appellant and stipulator for value and costs in said cause, and Sterling Carr, receiver in bankruptcy of said Nippon Yusen Kabushiki Kaisya, and hereby assign the following errors in the above entitled proceedings:

I.

The District Court erred in denying the motion of Nippon Yusen Kabushiki Kaisya for an order staying and holding in abeyance all proceedings on the libel and amended libel of Hermosa Amusement Corporation, Ltd., in the above cause until security was furnished Nippon Yusen Kabushiki Kaisya to respond in damages to its claim as set forth in its cross-libel filed in said cause pursuant to the provisions of Rule 50 of the rules enacted by the United States Supreme Court for practice in the Courts of Admiralty of the United States.

II.

The District Court erred in denying the motion of Nippon Yusen Kabushiki Kaisya for the continuance of the trial of the above entitled and consolidated causes from September 16, 1941, until such time as testimony of certain material and necessary witnesses could be obtained by deposition.

III.

The District Court erred in finding that the Japanese Motor Vessel "Sakito Maru" was solely at fault for the collision with the pleasure fishing barge "Olympic II" on September 4, 1940.

IV.

The District Court erred in not finding that the

“Olympic II” was at fault for said collision. [685]

V.

The District Court Erred in not rendering judgment in favor of Nippon Yusen Kabushiki Kaisya and against Hermosa Amusement Corporation, Ltd. on the libel and cross-libel in the above entitled cause and on the petition under the 56th Admiralty Rule in the above entitled and consolidated causes.

VI.

The District Court erred in not finding that the “Olympic II” was at fault for anchoring and remaining in the position and location in which she was at the time of the collision under the conditions then existing.

VII.

The District Court erred in not finding that the “Olympic II”, at the time of and prior to the collision, was anchored and maintained in a dangerous position so as to constitute a menace to navigation and that such fault was a cause of the collision.

VIII.

The District Court erred in finding that at the time of the collision the “Olympic II” was not anchored in the vicinity of any channel or fairway and in not finding that at such time she was anchored in a navigable channel within the meaning of Section 409 of Title 33 of the United States Code.

IX.

The District Court erred in finding that the Secretary of War had sufficient authority to prohibit the anchoring of the “Olympic II” at her place of

anchorage and that there was a presumption that her place of anchorage was safe and proper because the Secretary of War had not prohibited the same.

X.

The District Court erred in not finding the lookout on the [686] "Olympic II" was grossly inattentive and incompetent, failed to sound proper fog signals and neglected to take other precautionary steps required in the practice of good seamanship and by the attendant circumstances and that these faults contributed to the collision.

XI.

The District Court erred in finding that the deficiency and faults of the lookout aboard the "Olympic II" did not contribute to the collision.

XII.

The District Court erred in not finding that the "Olympic II" failed to sound proper fog signals.

XIII.

The District Court erred in not finding that the "Olympic II" was incompetently and inadequately manned and that this fault contributed to the resultant loss of life, personal injuries and property damage.

XIV.

The District Court erred in not finding that the "Olympic II" was unseaworthy and that this condition was a fault contributing to her sinking and to the resultant loss of life, personal injuries and property damage.

XV.

The District Court erred in finding that the minimum requirements specified for the "Olympic II" by the U. S. Local Inspectors of the Bureau of Marine Inspection and Navigation were not enforced and that the owners of the "Olympic II" were not obliged to comply with such minimum requirements prior to the time of the collision. [687]

XVI.

The District Court erred in finding that said minimum requirements imposed by the U. S. Local Inspectors of the Bureau of Marine Inspection and Navigation were a nullity and that they were without power or authority to impose the same.

XVII.

The District Court erred in finding that the "Olympic II" was not a seagoing barge within the meaning or contemplation of Section 395 of Title 46 of the United States Code.

XVIII.

The District Court erred in finding that the Japanese Motor Vessel "Sakito Maru" was proceeding at an immoderate speed at the time of and prior to the collision.

XIX.

The District Court erred in finding that if visibility was limited to 300 meters the "Sakito Maru" still was proceeding at an immoderate speed.

XX.

The District Court erred in finding that at 7:09 o'clock A. M. the "Sakito Maru" was proceeding at

not less than 8 miles per hour and in not finding that at this time the "Sakito Maru" was proceeding at not more than $6\frac{1}{2}$ knots per hour.

XXI.

The District Court erred in finding that at 7:03 o'clock A. M. the "Sakito Maru" was 9,120 feet distant from the "Olympic".

XXII

The District Court erred in finding that at the time of the collision the fog, from the standpoint of those aboard the "Sakito Maru", was not very thick and that the bright sun was breaking through and dissipating the fog. [688]

XXIII.

The District Court erred in finding that the lookout aboard the Japanese Motor Vessel "Sakito Maru" was inefficient or at fault in any respect.

XXIV.

The District Court erred in finding that the "Olympic II" was clearly visible to a person standing at the bow of the "Sakito Maru" for at least 1800 feet.

XXV.

The District Court erred in finding that even if the "Olympic II" and her owners might be at fault the "Sakito Maru", by the exercise of reasonable care and prudence, could have avoided the collision and is therefore chargeable with sole fault for the collision and the resultant loss of life, personal injuries and property damage.

XXVI.

The District Court erred in not finding that the master and officers of the "Sakito Maru" did not know and were not charged with notice that the "Olympic II" was anchored in the position and location that she was prior to sighting her immediately before the collision.

XXVII.

The District Court erred in finding that Captain Sato in loyalty to his own ship and crew placed too much credence in the testimony of his own lookout and thereby unconsciously submerged his own opinion and permitted the testimony of the lookout to become his own present conclusion.

XXVIII.

The District Court erred in denying the exception of Nippon Yusen Kabushiki Kaisya to and in affirming the report of the [689] Commissioner fixing the fair market value of the "Olympic II", less special fishing equipment, on September 4, 1940, at \$26,500 and the value of special equipment at \$3,000 and in not finding that the fair market value of the "Olympic II" and of such special equipment at such time were no greater than \$18,500 and \$2,000 respectively.

LILLICK, GEARY, McHOSE &
ADAMS

IRA S. LILLICK

JAMES L. ADAMS

Proctors for Appellants and
Petitioners.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Upon reading the petition of Nippon Yusen Kabushiki Kaisya, a corporation, and Fidelity and Deposit Company of Maryland, a [691] corporation, and Sterling Carr, receiver in bankruptcy of said Nippon Yusen Kabushiki Kaisya, for an appeal from the Final Decree entered in the above entitled cause on March 17, 1942, and on consideration of the Assignment of Errors filed herewith,

It Is Ordered that the appeal herein be allowed as prayed for, and

It Is Further Ordered that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and

It Is Further Ordered that the stipulation and bond for release heretofore filed herein be and the same hereby is adopted and approved as a supersedeas bond and as good and sufficient security in such respect and that the stipulations for costs heretofore filed herein, including that filed in conjunction with the petition under the 56th Admiralty Rule and the bond for costs on appeal filed herewith, be and the same hereby are adopted and approved as good and sufficient security.

Dated: Los Angeles, California, May 5, 1942.

BEN HARRISON

United States District Judge

[Endorsed]: Filed May 5, 1942. [692]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

Whereas, Nippon Yusen Kabushiki Kaisya, a corporation, [693] respondent, claimant, cross-libelant and the petitioner under the 56th Admiralty Rule in the above entitled cause, Fidelity and Deposit Company of Maryland, a corporation, stipulator for value and costs herein, and Sterling Carr, receiver in bankruptcy of said Nippon Yusen Kabushiki Kaisya, have appealed or are about to appeal from that certain Final Decree heretofore made and entered in the above entitled cause on March 17, 1942, and

Whereas, the American Bonding Company of Baltimore, a corporation qualified to act as surety in this court, is held and firmly bound unto Hermosa Amusement Corporation, Ltd., a corporation, libelant, cross-respondent, third party respondent and appellee herein, and J. M. Anderson, third party respondent and appellee, and to whom it may concern, in the sum of Two Hundred Fifty Dollars (\$250.00), for the payment of which well and truly to be made it does hereby bind itself, its successors and assigns, firmly by these presents, hereby consenting and agreeing that in case of default or contumacy on the part of said appellants, or each of them, or said surety, execution to the amount of Two Hundred Fifty Dollars (\$250.00) may issue against its *good*, chattels and land;

Now, Therefore, the condition of this obligation is such that if the above named appellants, and each of them, shall prosecute their said appeal with effect and pay all costs which may be awarded against them, or either of them, as such appellants if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

Dated: Los Angeles, California, May 4, 1942.

AMERICAN BONDING COM-
PANY OF BALTIMORE, a
corporation,

[Seal] By ROBERT HECHT
Attorney in Fact.

Attest:

S. M. SMITH
Agent. [694]

Examined and recommended for approval:

LILLYCK, GEARY, McHOSE &
ADAMS,
JAMES L. ADAMS.

I hereby approve the foregoing bond.

Dated: May 5, 1942.

BEN HARRISON,
United States District Judge.

(Duly verified.)

[Endorsed]: Filed May 5, 1942. [695]

[Title of District Court and Cause.]

**MOTION OF RECEIVER IN BANKRUPTCY
TO INTERVENE.**

Comes now Sterling Carr, receiver in bankruptcy of Nippon Yusen Kabushiki Kaisya, a corporation and alleged bankrupt, and hereby moves the above entitled court for leave to enter his appearance and intervene in behalf of said alleged bankrupt and its estate in the above entitled cause through his undersigned special counsel. [710]

This motion is made upon the grounds that such action is necessary for the proper protection of the interests of said alleged bankrupt and its estate.

This motion is based upon orders entered by the United States District Court for the Northern District of California in that certain proceeding in bankruptcy numbered 34889-W, authenticated copies of which will be produced upon the presentation of this motion, and upon the pleadings and records of the clerk of the above entitled court in the above entitled cause.

Dated: May 2, 1942.

LILLICK, GEARY, McHOSE
& ADAMS,

By IRA S. LILLICK,

Special Counsel for Said Receiver in Bankruptcy.

It is Hereby Stipulated and Agreed, by and between Hermosa Amusement Corporation, Ltd., a corporation, and J. M. Anderson and Sterling Carr,

receiver in bankruptcy of Nippon Yusen Kabushiki Kaisya, alleged bankrupt, through their respective undersigned counsel, that the foregoing motion may be heard and presented to the above entitled court at 9 A. M. o'clock on the 4th day of May, 1942, without further notice.

Dated: May 2, 1942.

ALFRED T. CLUFF,
CLUFF & BULLARD,

Attorneys for Hermosa Amusement Corporation, Ltd., and
J. M. Anderson.

LILLICK, GEARY, McHOSE &
ADAMS,

IRA S. LILLICK,
Special Counsel for Sterling
Carr, Said Receiver in
Bankruptcy.

[Endorsed]: Filed May 4, 1942. [711]

District Court of the United States
Southern District of California
Central Division

At a Stated Term, to wit: The February Term, A.D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 4th day of May, in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Ben Harrison, District Judge.

Nos. 1138, 1138, 1138, 1138, 1138, 1146, 1147, 1148, 1149, 1154, 1155, 1296—BH Adm.

[The Following Order Is Made in Each of the Above-Entitled Causes:]

This cause coming on for hearing motion of Sterling Carr, Receiver in Bankruptcy of Nippon Yusen Kabushiki Kaisya, a corporation, an alleged bankrupt, for leave to enter his appearance and intervene in behalf of said alleged bankrupt and its estate, filed May 4, 1942; Alfred T. Cluff, Esq., appearing as counsel for Hermosa Amusement Corp., Ltd. and J. M. Anderson; James L. Adams, Esq., appearing as counsel for Nippon Yusen Kabushiki Kaisya, a corp.; and Sterling Carr, Receiver in Bankruptcy of Nippon Yusen Kabushiki Kaisya, a corporation, Alleged Bankrupt, being present:

Said motion is presented and ordered filed, and the Court orders the said motion denied on the ground that the Court lacks jurisdiction. [712]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable Ben Harrison, Judge of the United States District Court, Southern District of California, Central Division:

Your petitioners, Nippon Yusen Kabushiki Kaisya, a corporation, respondent, claimant and the petitioner under the [717] 56th Admiralty Rule in the above entitled cause, Fidelity and Deposit Com-

pany of Maryland, a corporation and stipulator for value and costs herein, and Sterling Carr, receiver in bankruptcy of said Nippon Yusen Kabushiki Kaisya, pray that they may be permitted to take an appeal from the final decree entered in the above cause on March 19, 1942, to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors which is filed herewith, and that by such appeal they, and each of them, may have reviewed the questions whether the pleasure fishing barge "Olympic II" was not at fault for the collision between said vessel and the Japanese Motor Vessel "Sakito Maru" on September 4, 1940, whether the said Japanese Motor Vessel "Sakito Maru" was not free from fault for said collision, and whether the petition of your petitioner, Nippon Yusen Kabushiki Kaisya, under the 56th Admiralty Rule against Hermosa Amusement Corporation, Ltd., and J. M. Anderson herein should have been dismissed.

Your petitioners, and each of them, desire that the stipulation for costs heretofore filed in conjunction with said petition under the 56th Admiralty Rule and the bond for costs on appeal filed herewith be approved and sufficient security in such respect.

Dated: Los Angeles, California, May 5, 1942.

LILLICK, GEARY, McHOSE &
ADAMS,

IRA S. LILLICK,

JAMES L. ADAMS,

Proctors for Petitioners.

[Endorsed]: Filed May 5, 1942. [718]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Now come Nippon Yusen Kabushiki Kaisya, a corporation, appellant and respondent, claimant, cross-libelant and petitioner under the 56th Admiralty Rule in the above entitled cause, Fidelity and Deposit Company of Maryland, appellant and stipulator for value and costs in said cause, and Sterling Carr, receiver in bankruptcy [719] of said Nippon Yusen Kabushiki Kaisya, and hereby assign the following errors in the above entitled proceedings:

I.

The District Court erred in denying the motion of Nippon Yusen Kabushiki Kaisya for the continuance of the trial of the above entitled and consolidated causes from September 16, 1941, until such time as testimony of certain material and necessary witnesses could be obtained by deposition.

II.

The District Court erred in finding that the Japanese Motor Vessel "Sakito Maru" was solely at fault for the collision with the pleasure fishing barge "Olympic II" on September 4, 1940.

III.

The District Court erred in not finding that the "Olympic II" was at fault for said collision.

IV.

The District Court erred in not rendering judg-

ment in favor of Nippon Yusen Kabushiki Kaisya and against Hermosa Amusement Corporation, Ltd. on the libel and cross-libel in the above entitled cause and on the petition under the 56th Admiralty Rule in the above entitled and consolidated causes.

V.

The District Court erred in not finding that the "Olympic II" was at fault for anchoring and remaining in the position and location in which she was at the time of the collision under the conditions then existing.

VI.

The District Court erred in not finding that the "Olympic II", at the time of and prior to the collision, was anchored and maintained in a dangerous position so as to constitute a menace to [720] navigation and that such fault was a cause of the collision.

VII.

The District Court erred in finding that at the time of the collision the "Olympic II" was not anchored in the vicinity of any channel or fairway and in not finding that at such time she was anchored in a navigable channel within the meaning of Section 409 of Title 33 of the United States Code.

VIII.

The District Court erred in finding that the Secretary of War had sufficient authority to prohibit the anchoring of the "Olympic II" at her place of anchorage and that there was a presumption that her

place of anchorage was safe and proper because the Secretary of War had not prohibited the same.

IX.

The District Court erred in not finding the lookout on the "Olympic II" was grossly inattentive and incompetent, failed to sound proper fog signals and neglected to take other precautionary steps required in the practice of good seamanship and by the attendant circumstances and that these faults contributed to the collision.

X.

The District Court erred in finding that the deficiency and faults of the lookout aboard the "Olympic II" did not contribute to the collision.

XI.

The District Court erred in not finding that the "Olympic II" failed to sound proper fog signals.

XII.

The District Court erred in not finding that the "Olympic II" was incompetently and inadequately manned and that this fault [721] contributed to the resultant loss of life, personal injuries and property damage.

XIII.

The District Court erred in not finding that the "Olympic II" was unseaworthy and that this condition was a fault contributing to her sinking and to the resultant loss of life, personal injuries and property damage.

XIV.

The District Court erred in finding that the minimum requirements specified for the "Olympic II" by the U. S. Local Inspectors of the Bureau of Marine Inspection and Navigation were not enforced and that the owners of the "Olympic II" were not obliged to comply with such minimum requirements prior to the time of the collision.

XV.

The District Court erred in finding that said minimum requirements imposed by the U. S. Local Inspectors of the Bureau of Marine Inspection and Navigation were a nullity and that they were without power or authority to impose the same.

XVI.

The District Court erred in finding that the "Olympic II" was not a seagoing barge within the meaning or contemplation of Section 395 of Title 46 of the United States Code.

XVII.

The District Court erred in finding that the Japanese Motor Vessel "Sakito Maru" was proceeding at an immoderate speed at the time of and prior to the collision.

XVIII.

The District Court erred in finding that if visibility was limited to 300 meters the "Sakito Maru" still was proceeding at an immoderate speed. [722]

XIX.

The District Court erred in finding that at 7:09 o'clock A. M. the "Sakito Maru" was proceeding at not less than 8 miles per hour and in not finding that at this time the "Sakito Maru" was proceeding at not more than 6½ knots per hour.

XX.

The District Court erred in finding that at 7:03 o'clock A. M. the "Sakito Maru" was 9,120 feet distant from the "Olympic II".

XXI.

The District Court erred in finding that at the time of the collision the fog, from the standpoint of those aboard the "Sakito Maru", was not very thick and that the bright sun was breaking through and dissipating the fog.

XXII.

The District Court erred in finding that the look-out aboard the Japanese Motor Vessel "Sakito Maru" was inefficient or at fault in any respect.

XXIII.

The District Court erred in finding that the "Olympic II" was clearly visible to a person standing at the bow of the "Sakito Maru" for at least 1800 feet.

XXIV.

The District Court erred in finding that even if the "Olympic II" and her owners might be at fault the "Sakito Maru", by the exercise of reasonable

care and prudence, could have avoided the collision and is therefore chargeable with sole fault for the collision and the resultant loss of life, personal injuries and property damage.

XXV.

The District Court erred in not finding that the master and [723] officers of the "Sakito Maru" did not know and were not charged with notice that the "Olympic II" was anchored in the position and location that she was prior to sighting her immediately before the collision.

XXVI.

The District Court erred in finding that Captain Sato in loyalty to his own ship and crew placed too much credence in the testimony of his own lookout and thereby unconsciously submerged his own opinion and permitted the testimony of the lookout to become his own present conclusion.

LILLICK, GEARY, McHOSE &
ADAMS,

IRA S. LILLICK,

JAMES L. ADAMS,

Proctors for Appellants and
Petitioners.

[Endorsed]: Filed May 5, 1942. [724]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Upon reading the petition of Nippon Yusen Kabushiki Kaisya, a corporation, Fidelity and Deposit Company of Maryland, a corporation, Sterling Carr, receiver in bankruptcy of said Nippon Yusen Kabushiki Kaisya, for an appeal from the Final Decree entered [725] in the above entitled cause on March 19, 1942, and on consideration of the Assignment of Errors filed herewith,

It Is Ordered that the appeal herein be allowed as prayed for, and

It Is Further Ordered that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and

It Is Further Ordered that the stipulation for costs heretofore filed in conjunction with the petition of Nippon Yusen Kabushiki Kaisya, a corporation, under the 56th Admiralty Rule and the bond for costs on appeal filed herein on this day be and the same are hereby adopted and approved as good and sufficient security in such respect.

Dated: Los Angeles, California, May 5, 1942.

BEN HARRISON,

United States District Judge.

[Endorsed]: Filed May 5, 1942. [726]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

Whereas, Nippon Yusen Kabushiki Kaisya, a corporation, respondent, claimant and petitioner under the 56th Admiralty Rule [727] in the above entitled cause, Fidelity and Deposit Company of Maryland, a corporation, stipulator for value and costs herein, and Sterling Carr, receiver in bankruptcy of said Nippon Yusen Kabushiki Kaisya, have appealed or are about to appeal from that certain Final Decree heretofore made and entered in the above entitled cause on March 19, 1942, and

Whereas, the American Bonding Company of Baltimore, a corporation qualified to act as surety in this court, is held and firmly bound unto Hermosa Amusement Corporation, a corporation, and J. M. Anderson, third party respondents and appellees herein, and to whom it may concern, in the sum of Two Hundred Fifty Dollars (\$250.00), for the payment of which well and truly to be made it does hereby bind itself, its successors and assigns, firmly by these presents, hereby consenting and agreeing that in case of default or contumacy on the part of said appellants, or each of them, or said surety, execution to the amount of Two Hundred Fifty Dollars (\$250.00) may issue against its goods, chattels and land;

Now, therefore, the condition of this obligation is

such that if the above named appellants, and each of them, shall prosecute their said appeal with effect and pay all costs which may be awarded against them, or either of them, as such appellants if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

Dated: Los Angeles, California, May 4, 1942.

(Seal) AMERICAN BONDING COM-
PANY OF BALTIMORE, a
corporation.

By ROBERT HECHT,
Attorney in Fact.

Attest:

S. M. SMITH, Agent. [728]

Examined and recommended for approval:

LILLICK, GEARY, McHOSE &
ADAMS,
JAMES L. ADAMS

I hereby approve the foregoing bond.

Dated: May 5, 1942.

BEN HARRISON,
United States District Judge.

(Duly verified.)

[Endorsed]: Filed May 5, 1942. [729]

[Title of District Court and Cause.]

STIPULATION WAIVING DAMAGE QUESTIONS, ETC. ON APPEAL AND WITHDRAWING ASSIGNMENTS WITH REFERENCE THERETO. [915]

It is hereby stipulated and agreed, by and between Hermosa Amusement Corporation, Ltd., a corporation, libelant and appellee in the above entitled cause, and Nippon Yusen Kabushiki Kaisya, a corporation, respondent, claimant and appellant in the above entitled cause, and Sterling Carr, receiver in bankruptcy of Nippon Yusen Kabushiki Kaisya, a bankrupt, a party appellant in the above entitled cause, as follows:

1. That Assignment No. 1 contained in the Assignment of Errors on file herein be and the same is hereby withdrawn and that said appellants waive any right to question on the appeal in said cause the propriety of the ruling of the United States District Court in overruling the motion of said Nippon Yusen Kabushiki Kaisya for an order staying proceedings until security was furnished pursuant to the provisions of Rule 50 of the rules enacted by the United States Supreme Court for practice in the Courts of Admiralty of the United States.

2. That Assignment No. XXVIII contained in the Assignment of Errors on file herein be and the same hereby is withdrawn and that all parties waive any right to question on the appeal in said cause

whether the amount of damages which was fixed as being sustained by said Hermosa Amusement Corporation, Ltd. should be fixed at a higher or lower amount.

Dated: June 22nd, 1942.

ALFRED T. CLUFF,
HUGH B. ROTCHFORD,
GEO. H. MOORE,
CLUFF & BULLARD,

Proctor for Appellees.

LILLICK, GEARY, McHOSE &
ADAMS,
IRA S. LILLICK,
JAMES L. ADAMS,

Proctors for Appellants. [916]

[Title of District Court and Causes.] [917]

STIPULATION AND ORDER DESIGNATING
PARTS OF RECORD TO BE CERTIFIED
AND CONTAINED IN RECORD ON AP-
PEAL [924]

Whereas, Nippon Yusen Kabushiki Kaisya, a corporation, and Fidelity and Deposit Company of Maryland, a corporation, have appealed from those certain final decrees entered on the dates hereinafter mentioned in those certain causes more particularly described hereinafter, and Sterling Carr, receiver in bankruptcy of said Nippon Yusen Kabushiki

Kaisya, has also joined in certain of said appeals; and

Whereas, said causes may be referred to conveniently hereinafter by the letter symbol set opposite the respective number, description and title set forth below:

Symbol—No. of Cause and Description and Title.

- A. No. 1138-BH—Hermosa Amusement Corporation, Ltd., a California corporation, libelant, vs. The Motor Vessel "Sakito Maru", etc., Respondents.
- B. No. 1138-BH—Hermosa Amusement Corporation, Ltd., a California corporation, Libelant, vs. The Motor Vessel "Sakito Maru", etc., Respondents.
Grace E. Mayo, etc., Libelants in Intervention.
- C. No. 1138-BH—Hermosa Amusement Corporation, Ltd., a California corporation, Libelant, vs. The Motor Vessel "Sakito Maru", etc., Respondents.
George W. Berger, Libelant in Intervention.
- D. No. 1138-BH—Hermosa Amusement Corporation, Ltd., a California corporation, Libelant, vs. The Motor Vessel "Sakito Maru", etc., Respondents. [925]
Norma Rubin, Lena Karsh, Florence, Lillian and Shirley Rose Karsh, etc., Libelants in Intervention.

Symbol—No. of Cause and Description and Title.

E. No. 1138-BH—Hermosa Amusement Corporation, Ltd., a California corporation, Libelant, vs. The Motor Vessel “Sakito Maru”, etc., Respondents.

Albertine K. Johnson, etc., Libelants in Intervention.

F. No. 1138-BH—Hermosa Amusement Corporation, Ltd., a California corporation, Libelant, vs. The Motor Vessel “Sakito Maru”, etc., Respondents.

John Gilbert Montgomery, etc., Libelants in Intervention.

G. No. 1138-BH—Hermosa Amusement Corporation, Ltd., a California corporation, Libelant, vs. The Motor Vessel “Sakito Maru”, etc., Respondents.

S. T. Elliott, Libelant in Intervention.

H. No. 1146-Y—Roger S. Culp, etc., Libelant, vs. The Motor Vessel “Sakito Maru”, etc., Respondents.

I. No. 1147-BH—Wilma Greenwood, Libelant, vs. The Motor Vessel “Sakito Maru”, etc., Respondents.

J. No. 1148-Y—Helen McGrath, etc., Libelants, vs. The Japanese Motor Vessel “Sakito Maru”, etc., Respondents. [926]

K. No. 1149-RJ—L. R. Ohiser, Libelant, vs. The Motor Vessel “Sakito Maru”, etc., Respondents.

L. No. 1154-B—J. Eldon Anderson, Libelant, vs.

Symbol—No. of Cause and Description and Title.
The Motor Vessel “Sakito Maru”, etc., Respondents.

M. No. 1155-BH—Lucy Sylvester, etc., Libelants,
vs. Japanese Motor Vessel “Sakito Maru”,
etc., Respondents.

N. No. 1296-BH—Wilfred Rasmussen, Libellant,
vs. The Motor Vessel “Sakito Maru”, etc.,
Respondents.

and

Whereas, all of said causes arose out of the collision between the Motor Vessel “Sakito Maru” and the Fishing Barge “Olympic II” on September 4, 1940, were consolidated for purposes of trial and, for the convenience of the court on appeal and all parties interested, should be heard and considered on appeal on a consolidated record; and

Whereas, it appears that certain pleadings, testimony and exhibits in said causes, immaterial to the appeals in said causes, can be omitted from the record;

Now, therefore, it is hereby stipulated and agreed that the record on appeal in all of said causes shall be consolidated and shall consist of the following:

(Cause A)

1. First amended libel in rem and in personam.
2. Monition and return thereof.
3. Claim of Nippon Yusen Kabushiki Kaisya.
4. Stipulation and bond for release of vessel. [927]

5. Answer to original libel and attached interrogatories propounded to libelant.

6. Answer to first amended libel.

7. Cross-libel.

8. Citation on cross-libel.

9. Substitution of attorneys.

10. Order of U. S. District Judge Paul J. McCormick dated February 3, 1941.

11. Amended petition to bring in third party respondents filed May 13, 1941.

12. Citation against third party respondents dated May 13, 1941.

13. Libelant's answer to interrogatories.

14. Answer to amended petition to bring in third party respondents.

15. Answer to cross-libel and attached interrogatories propounded to cross-libelant.

16. Notice of motion for continuance of trial and affidavit of James L. Adams in support thereof.

17. Answer of third party respondents to intervening libels.

18. Amendment to amended petition to bring in third party respondents and order authorizing the same dated September 19, 1941.

19. Answers of cross-libelant to interrogatories.

20. Minute order of court of September 8, 1941, denying motion for continuance of trial.

21. Written opinion of court dated October 31, 1941.

22. Order of reference dated November 5, 1941.

23. Stipulation as to reasonableness of stipulated decrees filed December 16, 1941. [928]

24. Report of commissioner.

25. Minute order of court of March 16, 1942, ruling on exceptions to report of commissioner.

26. Final decree entered March 17, 1942.

(Cause B)

27. Amended libel in intervention.

28. Answer to amended libel.

29. Final decree entered December 19, 1941.

30. Satisfaction of final decree.

(Cause C)

31. Libel in intervention.

32. Answer to libel.

33. Final decree entered March 19, 1942.

34. Satisfaction of final decree.

(Cause D)

35. Libel in intervention filed September 6, 1941.

36. Answer to libel.

37. Final decree on second and third counts entered December 19, 1941.

38. Final decree on first count entered March 23, 1942.

39. Satisfaction of final decree entered December 19, 1941.

40. Satisfaction of final decree entered March 23, 1942.

(Cause E)

41. Libel in intervention.

- 42. Answer to libel. [929]
- 43. Amendment to libel.
- 44. Answer to amendment to libel.
- 45. Final decree entered December 22, 1941.
- 46. Satisfaction of final decree.

(Cause F)

- 47. Libel in intervention.
- 48. Answer to libel.
- 49. Final decree entered December 19, 1941.

(Cause G)

- 50. Libel in intervention.
- 51. Answer to libel.
- 52. Final decree entered December 22, 1941.

(Cause H)

- 53. Amended libel.
- 54. Answer to amended libel.
- 55. Petition to bring in third party respondents.
- 56. Citation against third party respondents.
- 57. Answer to Hermosa Amusement Corporation, Ltd. to amended libel and petition.
- 58. Final decree entered December 19, 1941.
- 59. Satisfaction of final decree.

(Cause I)

- 60. Libel.
- 61. Answer to libel.
- 62. Petition to bring in third party respondents.
- 63. Answer of Hermosa Amusement Corporation, Ltd. to libel and petition. [930]

64. Final decree entered December 19, 1941.

65. Satisfaction of final decree.

(Cause J)

66. Amended libel.

67. Answer to amended libel.

68. Petition to bring in third party respondents.

69. Answer of Hermosa Amusement Corporation, Ltd. to amended libel and petition.

70. Final decree entered December 19, 1941.

71. Satisfaction of final decree.

(Cause K)

72. Libel.

73. Answer to libel.

74. Petition to bring in third party respondents.

75. Answer of Hermosa Amusement Corporation, Ltd. to libel and petition.

76. Final decree entered December 19, 1941.

77. Satisfaction of final decree.

(Cause L)

78. Libel.

79. Answer to libel.

80. Petition to bring in third party respondents.

81. Answer of Hermosa Amusement Corporation, Ltd. to libel and petition.

82. Final decree entered December 19, 1941. [931]

(Cause M)

83. Amended libel.

84. Answer to amended libel.

- 85. Petition to bring in third party respondents.
- 86. Answer of Hermosa Amusement Corporation, Ltd. to amended libel and petition.
- 87. Final decree entered December 19, 1941.
- 88. Satisfaction of final decree.

(Cause N)

- 89. Libel.
- 90. Answer to libel.
- 91. Petition to bring in third party respondents.
- 92. Answer of Hermosa Amusement Corporation, Ltd. to libel and petition.
- 93. Final decree entered December 22, 1941.

(All Causes)

94. All testimony and proceedings at the trial, omitting all testimony in the reporter's transcript beyond page 868 thereof.

95. All exhibits offered at the trial and received in evidence, including the deposition of T. Yokota, G. Kato, S. Shimada, Spencer F. Hewins, David H. Bartlett and Philip J. Moynahan, with attached exhibits.

96. All testimony, stipulations and rulings of the court at hearing of motion for continuance on September 8, 1941.

(Cause A)

97. Motion of receiver in bankruptcy to intervene and stipulation regarding hearing of motion.

98. Order granting leave to intervene by receiver in bankruptcy. [932]

99. Petition for appeal.
100. Assignment of errors.
101. Order allowing appeal.
102. Bond for costs on appeal.
103. Citation and acknowledgment of service thereof.

(Cause B)

104. Petition for appeal.
105. Assignment of errors.
106. Order allowing appeal.
107. Bond for costs on appeal.
108. Citation and acknowledgment of service thereof.
109. Stipulation and order of April 27, 1942, extending time to docket appeal.
110. Order of May 4, 1942, extending time to docket appeal.
111. Motion of receiver in bankruptcy to intervene.
112. Minute order denying motion of receiver.

(Cause C)

113. Motion of receiver in bankruptcy to intervene and stipulation regarding hearing of motion.
114. Order granting leave to intervene by receiver in bankruptcy.
115. Petition for appeal.
116. Assignment of errors.
117. Order allowing appeal.
118. Bond for costs on appeal.

119. Citation and acknowledgment of service thereof. [933]

(Cause D)

120. Petition for appeal filed March 19, 1942.

121. Assignment of errors filed March 19, 1942.

122. Order of March 19, 1942, allowing appeal.

123. Bond for costs on appeal filed March 19, 1942.

124. Citation of March 19, 1942, and acknowledgment of service thereof.

125. Stipulation and order of April 27, 1942, extending time to docket appeal.

126. Order of May 4, 1942, extending time to docket appeal.

127. Motion of receiver in bankruptcy to intervene.

128. Minute order denying motion of receiver.

129. Motion of receiver in bankruptcy to intervene.

130. Order granting leave to intervene by receiver in bankruptcy.

131. Petition for appeal filed May 5, 1942.

132. Assignment of errors filed May 5, 1942.

133. Order of May 5, 1942, allowing appeal.

134. Bond for costs on appeal filed May 5, 1942.

135. Citation of May 5, 1942, and acknowledgment of service thereof.

(Cause E)

136. Petition for appeal.

137. Assignment of errors.

- 138. Order allowing appeal.
- 139. Bond for costs on appeal.
- 140. Citation and acknowledgment of service thereof.
- 141. Stipulation and order of April 27, 1942, extending time to docket appeal. [934]
- 142. Order of May 4, 1942, extending time to docket appeal.
- 143. Motion of receiver in bankruptcy to intervene.
- 144. Minute order denying motion of receiver.

(Cause F)

- 145. Petition for appeal.
- 146. Assignment of errors.
- 147. Order allowing appeal.
- 148. Bond for costs on appeal.
- 149. Citation and acknowledgment of service thereof.
- 150. Stipulation and order of April 27, 1942, extending time to docket appeal.
- 151. Order of May 4, 1942, extending time to docket appeal.
- 152. Motion of receiver in bankruptcy to intervene.
- 153. Minute order denying motion of receiver.

(Cause G)

- 154. Petition for appeal.
- 155. Assignment of errors.
- 156. Order allowing appeal.
- 157. Bond for costs on appeal.

158. Citation and acknowledgment of service thereof.

159. Stipulation and order of April 27, 1942, extending time to docket appeal.

160. Order of May 4, 1942, extending time to docket appeal.

161. Motion of receiver in bankruptcy to intervene.

162. Minute order denying motion of receiver. [935]

(Cause H)

163. Petition for appeal.

164. Assignment of errors.

165. Order allowing appeal.

166. Bond for costs on appeal.

167. Citation and acknowledgment of service thereof.

168. Stipulation and order of April 27, 1942, extending time to docket appeal.

169. Order of May 4, 1942, extending time to docket appeal..

170. Motion of receiver in bankruptcy to intervene.

171. Minute order denying motion of receiver.

(Cause I)

172. Petition for appeal.

173. Assignment of errors.

174. Order allowing appeal.

175. Bond for costs on appeal.

176. Citation and acknowledgment of service thereof.

177. Stipulation and order of April 27, 1942, extending time to docket appeal.

178. Order of May 4, 1942, extending time to docket appeal.

179. Motion of receiver in bankruptcy to intervene.

180. Minute order denying motion of receiver.

(Cause J)

181. Petition for appeal.

182. Assignment of errors.

183. Order allowing appeal.

184. Bond for costs on appeal. [936]

185. Citation and acknowledgment of service thereof.

186. Stipulation and order of April 27, 1942, extending time to docket appeal.

187. Order of May 4, 1942, extending time to docket appeal.

188. Motion of receiver in bankruptcy to intervene.

189. Minute order denying motion of receiver.

(Cause K)

190. Petition for appeal.

191. Assignment of errors.

192. Order allowing appeal.

193. Bond for costs on appeal.

194. Citation and acknowledgment of service thereof.

195. Stipulation and order of April 27, 1942, extending time to docket appeal.

196. Order of May 4, 1942, extending time to docket appeal.

197. Motion of receiver in bankruptcy to intervene.

198. Minute order denying motion of receiver.

(Cause L)

199. Petition for appeal.

200. Assignment of errors.

201. Order allowing appeal.

202. Bond for costs on appeal.

203. Citation and acknowledgment of service thereof.

204. Stipulation and order of April 27, 1942, extending time to docket appeal.

205. Order of May 4, 1942, extending time to docket appeal. [937]

206. Motion of receiver in bankruptcy to intervene.

207. Minute order denying motion of receiver.

(Cause M)

208. Petition for appeal.

209. Assignment of errors.

210. Order allowing appeal.

211. Bond for costs on appeal.

212. Citation and acknowledgment of service thereof.

213. Stipulation and order of April 27, 1942, extending time to docket appeal.

214. Order of May 4, 1942, extending time to docket appeal.

215. Motion of receiver in bankruptcy to intervene.

216. Minute order denying motion of receiver.

(Cause N)

217. Petition for appeal.

218. Assignment of errors.

219. Order allowing appeal.

220. Bond for costs on appeal.

221. Citation and acknowledgment of service thereof.

222. Stipulation and order of April 27, 1942, extending time to docket appeal.

223. Order of May 4, 1942, extending time to docket appeal.

224. Motion of receiver in bankruptcy to intervene.

225. Minute order denying motion of receiver. [938]

(All Causes)

226. Order of June 15, 1942, extending time to docket appeal

227. Stipulation waiving damage questions on appeal and withdrawing assignments with reference thereto.

228. This stipulation and order.

It is further stipulated and agreed that each pleading or document whose foregoing item number is

listed below may be treated appropriately as typical of similar pleadings or documents filed in each of the causes set forth opposite such respective item numbers listed below:

Item No.	Causes
3	B, C, D, E, H, I, J, K.
16	All
20	All
21	All
56	I, J, K, L, M, N.

It is further stipulated and agreed that in making up and certifying the record to be transmitted to the Circuit Court of Appeals for the Ninth Circuit, the Clerk of the above entitled Court shall omit all formal captions and titles, except the caption upon the libel or the amended libel, as the case may be, and the final decree in each of the causes, substituting therefor the words "Title of Court and Cause"; that all verifications may be omitted, substituting therefor the word "Verified"; that the Clerk of the above entitled Court be and he hereby is requested to certify all the original exhibits offered at the trial and at the aforesaid hearing before the Commissioner and admitted in evidence, except those omitted by stipulation herein, and to forward the same with the record to the Circuit Court of Appeals for the [939] Ninth Circuit; that the Clerk of the above entitled Court be and he hereby is requested to prepare and certify for the Circuit Court of Appeals for the Ninth Circuit the

record on appeal in accordance with this stipulation and with Rule 5 of the Rules in Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit.

June 19, 1942.

ALFRED T. CLUFF,
HUGH B. ROTCHFORD,
GEO. H. MOORE,
CLUFF & BULLARD,

Proctors for Appellees.

LILLICK, GEARY, McHOSE &
ADAMS,

IRA S. LILLICK,
JAMES L. ADAMS,

Proctors for Appellants.

It is so ordered this 22 day of June, 1942.

BEN HARRISON,
U. S. District Judge.

[Endorsed]: Filed Jun. 22, 1942. [940]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO APOSTLES
ON APPEAL

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 956, inclusive, contain full, true and correct copies of the following:

In Case No. 1138-BH Adm. First Amended Libel in Rem and in Personam of Hermosa Amusement Corporation, Ltd.; Monition and Return thereof; Claim of Nippon Yusen Kabushiki Kaisya, a corporation; Stipulation and Bond for Release of Vessel; Answer of Nippon Yusen Kabushiki Kaisya to Libel of Hermosa Amusement Corporation, Ltd. and Interrogatories; Answer of Nippon Yusen Kabushiki Kaisya, a corporation, to First Amended Libel of Hermosa Amusement Corporation, Ltd.; Cross-Libel of Nippon Yusen Kabushiki Kaisya, a corporation; Citation on Cross-Libel; Substitution of Attorneys; Order dated February 3, 1941, transferring cases to Judge Harrison; Amended Petition to bring in Third Party Respondents under Admiralty Rule 56, filed May 13, 1941; Citation against Third Party Respondents, dated May 13, 1941; Libelant's Answers to Interrogatories Attached to Answer of Claimant and Respondent, Nippon Yusen Kabushiki Kaisya; Answer of Hermosa Amusement Corporation, Ltd. (Libelant Herein) and J. M. Andersen to Amended Petition of Nippon Yusen Kabushiki Kaisya to Bring in Third Party Respondents; Answer of Hermosa Amusement Corporation, Ltd. to Cross-Libel of Nippon Yusen Kabushiki Kaisya; Notice of Motion for Continuance of Trial, and Affidavit of James L. Adams; Answer of Hermosa Amusement Corporation, Ltd. and J. M. Andersen, Respondents and Third Party Respondents, to Intervening Libels; Amendment to Amended Petition to Bring in

Third Party Respondents under Admiralty Rule 56, and form of order (unsigned) thereon; Minute Order dated September 19, 1941, that Amendment to Amended Petition to Bring in Third Party Respondents under Admiralty Rule 56 re Intervening Libel of S. T. Elliott be filed; [950] Answers of Cross-Libellant to Interrogatories propounded by Cross-Respondent; Minute Order of September 8, 1941 Denying Continuance of Trial; Opinion, dated October 31, 1941; Order of Reference to Commissioner; Stipulation as to Reasonableness of Stipulated Decrees; Report of Commissioner; Minute Order of March 16, 1942, Ruling on Exceptions to Commissioner's Report; Final Decree and Judgment for Libellant, Hermosa Amusement Corporation, Ltd.; Motion of Receiver in Bankruptcy to Intervene; Order Granting Leave to Intervene by Receiver in Bankruptcy; Petition for Appeal; Assignment of Errors; Order Allowing Appeal; Bond for Costs on Appeal;

In Case No. 1138-BH Adm. (Intervention of Grace E. Mayo, etc., et al.): Order re filing of Amended Libel, and Amended Libel in Intervention of Grace E. Mayo and Frank F. Mayo; Answer to Amended Libel in Intervention of Grace E. Mayo and Frank F. Mayo and Interrogatories; Final Decree; Satisfaction of Final Decree; Petition for Appeal; Assignment of Errors; Order Allowing Appeal; Bond for Costs on Appeal; Stipulation and Order of April 27, 1942, extending time to docket Appeal; Order Allowing Extension of

Time for Filing Apostles; Motion of Receiver in Bankruptcy to Intervene;

In Case No. 1138-BH Adm. (Intervention of George W. Berger): Libel in Rem and in Personam by George W. Berger in Intervention; Answer to Libel in Intervention of George W. Berger and Interrogatories; Final Decree on Libel in Intervention of George W. Berger; Satisfaction of Final Decree; Motion of Receiver in Bankruptcy to Intervene; Order Granting Leave to Intervene by Receiver in Bankruptcy; Petition for Appeal; Assignment of Errors; Order Allowing Appeal; Bond for Costs on Appeal;

In Case No. 1138-BH Adm. (Intervention of Norma Rubin, et al.): Intervening Libel of Norma Rubin, Lena Rubin, Florence, Lillian and Shirley Rose Karsh in Rem and in Personam; Answer to Libel in Intervention of Norma Rubin, Lena Karsh, Florence, Lillian and Shirley Rose Karsh, by Lena Karsh, their Mother and Guardian Ad Litem and [951] Interrogatories; Decree on Second and Third Counts of Intervening Libel of Lena Karsh, Florence, Lillian and Shirley Rose Karsh by their Mother and Guardian ad Litem, Lena Karsh; Decree on First Count of Intervening Libel of Norma Rubin; Satisfaction of Final Decree entered December 19, 1941; Satisfaction of Final Decree on First Count of Intervening Libel of Norma Rubin; Petition for Appeal, filed March 19, 1942; Assignment of Errors, filed March 19, 1942; Order Allowing Appeal, filed March 19, 1942; Bond for Costs

on Appeal, filed March 19, 1942; Stipulation and Order Extending Time to Docket Appeal, filed April 27, 1942; Order Allowing Extension of Time for Filing Apostles; Motion of Receiver in Bankruptcy to Intervene, filed May 4, 1942; Motion of Receiver in Bankruptcy to Intervene, filed May 4, 1942; Order Granting Leave to Intervene by Receiver in Bankruptcy; Petition for Appeal, filed May 5, 1942; Assignment of Errors, filed May 5, 1942; Order Allowing Appeal, filed May 5, 1942; Bond for Costs on Appeal, filed May 5, 1942;

In Case No. 1138-BH Adm. (Intervention of Elwood Johnson and Albertine K. Johnson): Libel in Intervention; Answer to Libel in Intervention of Elwood Johnson and Albertine K. Johnson, and Interrogatories; Amendment to Libel in Rem and in Personam; Answer of Nippon Yusen Kabushiki Kaisya to Amendment to Libel in Rem and in Personam; Final Decree; Satisfaction of Final Decree; Petition for Appeal; Assignment of Errors; Order Allowing Appeal; Bond for Costs on Appeal; Stipulation and Order of April 27, 1942, Extending Time to Docket Appeal; Order Allowing Extension of Time for Filing Apostles; Motion of Receiver in Bankruptcy to Intervene;

In Case No. 1138-BH Adm. (Intervention of John Gilbert Montgomery, etc.): Libel in Intervention in Personam; Answer to Libel in Intervention of John Gilbert Montgomery, by his Guardian ad Litem, Margerie L. Montgomery, and Interrogatories; Final Decree of Libelant in Intervention

John Gilbert Montgomery; Petition for Appeal; Assignment of Errors; Order Allowing Appeal; Bond for Costs [952] on Appeal; Stipulation and Order of April 27, 1942, Extending Time to Docket Appeal; Order Allowing Extension of Time for Filing Apostles; Motion of Receiver in Bankruptcy to Intervene;

In Case No. 1138-BH Adm. (Intervention of S. T. Elliott): Libel in Intervention in Rem and in Personam for Personal Injuries and Property Damage; Answer of Nippon Yusen Kabushiki Kaisya to Libel in Intervention of S. T. Elliott; Final Decree; Petition for Appeal; Assignment of Errors; Order Allowing Appeal; Bond for Costs on Appeal; Stipulation and Order of April 27, 1942, Extending Time to Docket Appeal; Order Allowing Extension of Time for Filing Apostles; Motion of Receiver in Bankruptcy to Intervene;

In Case No. 1146-BH Adm. Amended Libel in Rem and in Personam; Answer to Amended Libel in Rem and in Personam; Petition to Bring in Third Party Respondents Under Admiralty Rule 56; Citation against Third Party Respondents; Answer of Hermosa Amusement Corporation, Ltd. and J. M. Andersen, Third Party Respondents, to Amended Libel and Third Party Petition; Final Judgment and Decree in Rem and in Personam; Satisfaction of Final Decree; Petition for Appeal; Assignment of Errors; Order Allowing Appeal; Bond for Costs on Appeal; Stipulation and Order of April 27, 1942, Extending Time to Docket Appeal; Order Allowing Extension of Time for Filing

Apostles; Motion of Receiver in Bankruptcy to Intervene;

In Case No. 1147-BH Adm.: Libel in Rem and in Personam; Answer to Libel of Wilma Greenwood and Interrogatories; Petition to Bring in Third Party Respondents under Admiralty Rule 56; Answer of Hermosa Amusement Corporation, Ltd. and J. M. Andersen, Third Party Respondents, to Libel and Third Party Petition; Decree; Satisfaction of Final Decree; Petition for Appeal; Assignment of Errors; Order Allowing Appeal; Bond for Costs on Appeal; Stipulation and Order of April 27, 1942, Extending Time to Docket Appeal; Order Allowing Extension of Time for Filing Apostles; Motion of Receiver in Bankruptcy to Intervene; [953]

In Case No. 1148-BH Adm. Amended Libel in Rem and in Personam for Wrongful Death Arising out of Collision; Answer to Amended Libel of Helen McGrath, Helen McGrath as Administratrix, and Helen McGrath as Special Administratrix, and Interrogatories; Petition to Bring in Third Party Respondents under Admiralty Rule 56; Answer of Hermosa Amusement Corporation, Ltd. and J. M. Andersen, Respondents and Third Party Respondents to First Amended Libel and Third Party Petition; Final Decree for Libelants; Satisfaction of Judgment and Final Decree; Petition for Appeal; Assignment of Errors; Order Allowing Appeal; Bond for Costs on Appeal; Stipulation and Order of April 27, 1942, Extending Time to Docket Appeal; Order Allowing Extension of Time for

Filing Apostles; Motion of Receiver in Bankruptcy to Intervene;

In Case No. 1149-BH Adm. Libel in Rem and in Personam; Answer to Libel of L. R. Ohiser, and Interrogatories; Petition to Bring in Third Party Respondents Under Admiralty Rule 56; Answer of Hermosa Amusement Corporation, Ltd. and J. M. Andersen, Third Party Respondents, to Libel and Third Party Petition; Final Decree; Satisfaction of Final Decree; Petition for Appeal; Assignment of Errors; Order Allowing Appeal; Bond for Costs on Appeal; Stipulation and Order of April 27, 1942, Extending Time to Docket Appeal; Order Allowing Extension of Time for Filing Apostles; Motion of Receiver in Bankruptcy to Intervene;

In Case No. 1154-BH Adm. Libel in Personam for Damages; Answer to Libel of J. Eldon Anderson, and Interrogatories; Petition to Bring in Third Party Respondents under Admiralty Rule 56; Answer of Hermosa Amusement Corporation, Ltd. and J. M. Andersen, Respondents and Third Party Respondents, to Libel and Third Party Petition; Judgment; Petition for Appeal; Assignment of Errors; Order Allowing Appeal; Bond for Costs on Appeal; Stipulation and Order of April 27, 1942, Extending Time to Docket Appeal; Order Allowing Extension of Time for Filing Apostles; Motion of Receiver in Bankruptcy to Intervene; [954]

In Case No. 1155-BH Adm. Amended Libel in Rem and in Personam for Wrongful Death Arising out of Collision; Answer of Nippon Yusen Kabushiki Kaisya to Amended Libel; Petition to Bring

in Third Party Respondents under Admiralty Rule 56; Answer of Hermosa Amusement Corporation, Ltd. and J. M. Andersen, Respondents and Third Party Respondents to Amended Libel and Third Party Petition; Decree; Satisfaction of Final Decree; Petition for Appeal; Assignment of Errors; Order Allowing Appeal; Bond for Costs on Appeal; Stipulation and Order of April 27, 1942, Extending Time to Docket Appeal; Order Allowing Extension of Time for Filing Apostles; Motion of Receiver in Bankruptcy to Intervene;

In Case No. 1296-BH Adm. Libel in Personam for Damages; Answer to Libel of Wilfred Rasmussen; Petition to Bring in Third Party Respondents under Admiralty Rule 56; Answer of Hermosa Amusement Corporation, Ltd. and J. M. Andersen, Third Party Respondents, to Libel and Third Party Petition; Final Decree; Petition for Appeal; Assignment of Errors; Order allowing Appeal; Bond for Costs on Appeal; Stipulation and Order of April 27, 1942, Extending Time to Docket Appeal; Order Allowing Extension of Time for Filing Apostles; Motion of Receiver in Bankruptcy to Intervene;

In Cases Numbered 1138-BH Adm. (Intervention of Norma Rubin, et al.), (Intervention of Albertine K. Johnson, et al.), (Intervention of Grace E. Mayo, et al.), (Intervention of John Gilbert Montgomery, etc.), (Intervention of S. T. Elliott), 1146-BH Adm., 1147-BH Adm., 1148-BH Adm., 1149-BH Adm., 1154-BH Adm., 1155-BH Adm.,

1296-BH Adm.: Minute Order of May 4, 1942, denying motions of Receiver in Bankruptcy to Intervene;

In All Causes in This Appeal: Order of June 15, 1942, Allowing Extension of Time for Filing Apostles; Stipulation Waiving Damage Questions, etc. on Appeal and Withdrawing Assignments with Reference thereto; Stipulation and Order Designating Parts of Record to Be Certified and Contained in Record on Appeal; Order of [955] June 29, 1942, Allowing Extension of Time for Filing Apostles, which together with the original Citations on Appeal (herein included and numbered), the original Reporter's Transcripts of the trial and hearing on motion for continuance for trial, and the original Exhibits, including the Depositions of T. Yokota, G. Kato, S. Shimada, Spencer F. Hewins, David H. Bartlett and Philip J. Moynahan and attached exhibits, transmitted herewith, constitute the apostles on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$154.25, which amount has been paid to me by Appellants.

Witness my hand and the seal of the said District Court this 9th day of July, A.D. 1942.

[Seal]

EDMUND L. SMITH,

Clerk.

By THEODORE HOCKE,

Deputy. [956]

REPORTER'S TRANSCRIPT
HEARING ON MOTION FOR CONTINUANCE
OF TRIAL

Los Angeles, California,
Monday, September 8, 1941;
10:00 a. m.

The Court: All right, proceed.

Mr. Adams: If the Court please, we have several motions on file here and I intended, if the Court had no objection to this procedure, to bring on at this time the motion for a continuance. That motion involves all of the actions, and all of the attorneys representing all of the claimants, I take it, are in court in response to the motion, and the rest of them who are not interested in the death actions are not concerned with that motion, and perhaps it would be advisable to take up the motion for a continuance, first, if the Court agrees with that suggestion.

The Court: That is satisfactory.

Mr. Montgomery, Sr.: Your Honor, before taking up that motion, on behalf of the other counsel, a great many of them—not all of them, but on behalf of the other counsel who have been served with this motion, we say the procedure is quite irregular. to bring a motion to dismiss as to the judgment in rem at this time, after waiting a whole year from the date of giving the bonds, and that the whole matter should go over until the time of trial.

The Court: Well, the only thing, I am not going

to rule on the motion until I have studied the authorities, and I have a busy week. I do not know how I am going to have a chance to pass on the motions before the actual trial, any- [957] how.

Mr. Lippert: On that point, your Honor, I would like also to say on behalf of one of the intervening libelants that we propose to introduce evidence on the question of jurisdiction, unless your Honor is prepared to hear it this morning. I think we have the right to go into the question of the extent of San Pedro Bay, and in that regard we would like to introduce evidence.

Mr. Adams: I have no objection to evidence——

The Court: I am not going to take any evidence this morning: I am going to give you a chance next week.

Mr. Adams: With reference to the motion for a continuance, at the Court's suggestion, I would like to offer into evidence or into the records of this hearing statements of the witnesses who are unavailable and whose depositions cannot be obtained prior to the trial scheduled on September 16th. They cannot be brought here for the trial because they are presently located in Japan. I have the original signed statements of these various witnesses and I can either make a statement as to the manner in which those statements were secured from the witnesses, if counsel will stipulate that such statements——

The Court: As I understand your position, if they were present they would in substance testify as in the statements?

Mr. Adams: That is correct. [958]

The Court: Have opposing counsel, any of them, had an opportunity to examine them?

Mr. Adams: Of course, we only had one or two copies of all these statements. I sent the one available copy to Mr. Cluff.

Mr. Montgomery, Sr.: I have seen the statements, your Honor, and I have shown them to several of the gentlemen. We met in Mr. Cluff's office.

Mr. Cluff: I do not think all of them have seen them, but some of them have.

Mr. Montgomery, Sr.: Those of us who met accepted Mr. Cluff's recommendation that we could stipulate that the witnesses, if called, would so testify. So that if your Honor will call the roll of all present, or have the roll called, I think we can make a stipulation.

Mr. Cluff: Before that stipulation is made, I understood the person who took the statements would make a statement, or take the stand, and I would just like to ask one or two questions.

The Court: Just what is that?

Mr. Cluff: I say, before I enter into a stipulation I would like to ask one or two questions of the gentleman who took the statements.

The Court: I don't think so. I think that that is what they claim is going to be their testimony, and you either stipulate that they will so testify or not. That is [959] what they are claiming, and you can either stipulate that they would so testify or not.

Mr. Cluff: True, and I want to find out if the statements contain all the investigation, or only that part of it they want to introduce.

The Court: If you want to go into that we will continue the matter for that purpose, gentlemen, and take evidence. I think you are right up against this proposition: You either stipulate that the witnesses would so testify if present, or then the Court will go into the question whether or not the case should be continued. Of course, it all involves the same motion, I realize that very well.

Mr. Adams: If the Court please, I do not think the record shows what the disposition of all counsel of record here is with respect to such a stipulation. Of course, I am not going to enter into a stipulation which means that if they stipulate to these we stipulate that our motion should be denied, because I can still recognize the prejudice by not having the full and complete testimony of a witness. That is something that I intended to argue, but I realize that the Court would like to know what counsel are willing to do with reference to these statements.

The Court: Well, let us find out. Have the Clerk call the roll of the counsel.

Mr. Montgomery, Sr.: May I make this further suggestion, your Honor? Or, Mr. Cluff, will you make it? You are [960] familiar with it.

Mr. Cluff: Judge Montgomery suggested an amendment to the proposed stipulation, that is, in addition to the statements, that either side, if so

advised, may use the testimony of the witnesses before the A Board.

Mr. Adams: I am not entering into the stipulation.

Mr. Cluff: Very well.

The Court: As I understand it, the position here of the representatives of the "Sakito Maru" is that they are moving for a continuance, and the showing here is that the witnesses, if present, would testify as set forth in the statements. One way to overcome that is to offer to stipulate. If you do not want to accept them, you may object to them.

Mr. Cluff: In connection with the suggestion I made a moment ago, it just occurred to me that there is as yet no showing as to what these witnesses will testify. I take it Mr. Adams is prepared to represent to the Court that these statements were taken and that the witnesses will testify to them. I have one or two questions I wanted to ask on cross-examination.

The Court: I differ with you, in this:—

Mr. Cluff: I will accept your Honor's ruling, but I just wanted to explain my position.

The Court: I differ with you in this: Here is a motion for a continuance which they claim is for material witnesses [961] and they want those witnesses present. He has presented written statements, and stating that these witnesses would in effect testify as follows:—Now the statements should be made a part of the record.

Mr. Cluff: I think I see your point. I will

take the ruling and offer on behalf of Hermosa Amusement Corporation to stipulate that if the witnesses, who will be identified in Mr. Adams' statement, were called as witnesses in this case they would testify substantially in accordance with the written statements which counsel has in his hand.

Mr. Adams: I would like to offer these, if the Court please.

The Court: You may offer them.

Mr. Cluff: That is done on behalf of the Hermosa Amusement Company and J. M. Anderson, Libellant, Cross-Respondent, Third Party Respondent, and, I think pretty near everything else that we have.

Mr. Montgomery: We accept this——

Mr. Adams: May I describe the statements for the record?

The Court : Yes.

Mr. Adams: There are six statements in all, the first being that of T. Karasuda, first engineer; the second one is that of A. Kanda, apprentice officer; the third is H. Aono, quartermaster; the fourth is K. Mamba, quartermaster; the fifth is E. Yokoyama, apprentice sailor; and the sixth and [962] last is the N. Nakumura, electrical engineer.

I have previously offered them, but I renew my offer.

The Court: I would like to have the Clerk call counsel representing others.

The Clerk: Other than Mr. Cluff?

The Court: Yes, because he only represents the one.

Mr. Adams: I have available, if the Court please, another set of them here, a copy of them, if some of the counsel who have not seen them wish to examine them.

Mr. Montgomery, Sr.: I think counsel should serve us with copies of those.

The Court: I don't think he has to serve you with anything. [This proceeding was more or less suggested by the Court, because the Court felt that the motion itself was not complete enough; in other words, it was too general.

Mr. Montgomery, Sr.: The showing made so far——

The Court: And that the Court, instead of having to wait until the morning of the hearing, if the Court was to grant a continuance, I wanted to grant it today so I could utilize that time, and to shorten it, I suggested that he be prepared to make a showing this morning as to what the witnesses would testify to so that counsel would have an opportunity of offering, and stipulate that they would so testify.

The Clerk: I will call the names of counsel that I have here, your Honor.

Wayland and Stearns, for Grace E. Mayo. [963]

Mr. Stearns: Frank L. Stearns. We will so stipulate, your Honor.

The Clerk: What is your name, please?

Mr. Stearns: Stearns, Frank.

The Clerk: David I. Lippert, for Frank F. Mayo.

Mr. Lippert: I stipulate that the witnesses would so testify, if called.

The Clerk: H. C. Velpmen, for Elwood Johnson and Albertina K. Johnson.

Mr. Velpmen: So stipulate.

Mr. Eastham: H. C. Eastham, for Roger Culp. I will so stipulate, your Honor.

The Clerk: Charles E. Millikan, for Wilma Greenwood.

Mr. Millikan: I will so stipulate, your Honor.

The Clerk: Claude F. Weingand, for L. R. Ohiser.

A Voice: Not present.

The Clerk: Reay, Sharf and Reay, for J. Eldon Anderson.

A Voice: Not present.

The Clerk: Harvey R. McKee, for Wilfred Rasmussen.

Mr. McKee: I will so stipulate, your Honor.

The Clerk: Perry G. Briney, for G. W. Berger.

Mr. Briney: Never having heard about these statements before just a few minutes ago and not having seen them, I could not stipulate.

The Court: Then you do not stipulate? [964]

Mr. Briney: Then I do not stipulate.

The Court: That is all you need to say.

The Clerk: Mr. Charles C. Montgomery, for Lena Karsh, Norma Rubin, and others.

Mr. Montgomery, Sr.: We so stipulate.

The Clerk: David A. Fall, for International Broadcasting Company.

Mr. Fall: We so stipulate.

The Clerk: Phi O. Clough and David A. Fall for John Gilbert Montgomery, etc.

Mr. Fall: We accept the same stipulation.

The Clerk: George Harnagle for Helen McGrath.

Mr. Harnagle: I would like to ask Mr. Adams one question, and that is this: Some of these same witnesses have testified under oath before the A Board, did they not?

Mr. Adams: Some of them did; yes.

Mr. Harnagle: Do you have any objection to a stipulation that their testimony before the A Board may also come in, as well as these statements?

Mr. Adams: If the Court please, my position with respect to this stipulation is not exactly clear, certainly, at this time.

[The Court: I think it should be clear. You have not offered to stipulate to anything.

Mr. Adams: No. I feel this way about it, if the Court please: I do not feel that a stipulation that witnesses [965] would testify in accordance with statements that counsel, myself, has obtained in outline form to indicate the nature of their testimony is ever as satisfactory as the actual testimony of those witnesses, given either on the stand or by way of deposition. No one taking that statement from a witness purports to cover every minute and detailed point that he expects that witness will testify to. And I do feel, irrespective of whether this testimony is permitted to be introduced into the record by virtue of counsel stipulating that these witnesses would so testify, that there is a prejudice resulting to the owners of the "Sakito Maru" in

not having the full testimony of those witnesses available either by way of deposition or through the witnesses appearing here at the trial.

The Court: Just a moment. These proceedings are being reported, are they not?

Mr. Adams: Yes.

The Court: I think that the record at this time should show, as the background of this motion, that when the representative of the "Sakito Maru" came here nearly a year ago for the fixing of the bond, that counsel stated that it was necessary for them to put up security with the bonding company, because the bonding company, due to the international situation, were requiring it. In other words, the difficulty in getting these witnesses here today is due to the international situation; and that situation has existed virtually [966] all the time that this case has been pending; that the Court has stated before, not once, but a number of times, either in court or in chambers, when the Court has been discussing some of the preliminary features of this case with counsel that they must arrange to take their depositions; that the Court was not going to unnecessarily delay this case because of the failure to take depositions, because the Court realized the international situation instead of getting better was likely to get worse. And the Court is approaching this motion today cognizant of the fact that we have all been aware, and the Court has so expressed itself, that the international situation was becoming more tense; that the ability to obtain the depositions

of these witnesses would require great lengths of time, and the Court has constantly warned counsel of that situation.

On the other hand, I realize that counsel was anticipating having these witnesses here in person and, therefore, did not take their depositions. Due to the present strained relationship between this government and the Japanese government it has not been possible for these witnesses to be present. However, counsel has had a full opportunity of getting as full statements from those people as he could possibly get; and in view of this stipulation, to the parties who so stipulate, the Court is not inclined to grant a continuance.

It might be more satisfactory if the testimony before the A Board all is admitted, but as I view the situation, [967] these statements and it being stipulated that if they were present they would in substance so testify, that does not preclude the opposing counsel from impeaching that testimony by other statements that they may have made at other times.

Mr. Adams: May I supplement the statement of the background, if the Court please? I was not in court at the time the bonds were fixed, so I am in no position to disagree with the Court, even if I were so inclined, about the statements made as to the collateral posted for the issuance of bonds. But I am rather surprised that anyone would make such a statement, assuming that it might have been made by a representative of our office, because col-

lateral is always required and the international situation could have nothing to do with the requirement of collateral.

The Court: Other counsel present, or any other counsel who recalls that statement?

Mr. Adams: I do not mean to say that the Court has made a misstatement, except I don't think that enters into the situation.

The Court: The point is that the strained relationship of the international situation was right out in front at that time.

Mr. Adams: I would like to just make these few supplementary remarks. I recall very distinctly of the Court having made an announcement from the bench at a hearing we had here in this court room. As I recall, it was in connection [968] with the limitation of liability proceedings that were filed, if I am not mistaken, the latter part of January. Therefore, this hearing probably could not have been before February. I think it was had after the cases were set for trial at the term trial calendar. At that time the Court said that the case would go to trial as scheduled, and the Court wanted everybody to take pains to get the witnesses assembled and be ready to go to trial.

The Court: You also recall the fact that in chambers I have also discussed it with you.

Mr. Adams: Yes.

The Court: The necessity, on account of the number of witnesses, and the fact that they were on the seas, that I have constantly tried to impress

counsel with the necessity of arranging their testimony and evidence so the case could go to trial.

Mr. Adams: I do not dispute that, if the Court please. I just wanted to point out that that first intimation—not “intimation”—but the first statement, I think, the Court made on that subject was after the cases were set for trial, because you will recall that there was, just before setting time, an order consolidating all these cases into this court room, therefore, the Court would not have had reason to make such a statement regarding all these cases beforehand, because it was not until the call of that term calendar that the cases were first brought before your Honor, that is, all [969] of them consolidated for trial. [The statements that were made in informal conferences we had, I think followed the statements the Court made from the bench. If I am not mistaken, it was at the first occasion that the Court mentioned that subject from the bench that I advised the Court that we had already made plans to take the depositions of three of the witnesses upon the arrival of the “Sakito Maru” on June 4, 1941. Plans had been made—

The Court: I recall making the statement that you were expecting to take certain depositions upon the arrival of the boat, because we discussed also the question of whether or not we could set this case for trial at a time the “Sakito Maru” would be in.

Mr. Adams: I believe that is correct; and I believe in answer to that inquiry we pointed out that

there were only three witnesses to the collision who still were aboard the "Sakito Maru."

The Court: And not on regular schedule, either.

Mr. Adams: That is correct; her schedule had been changed at that time. At the time arrangements had been made for those depositions I had also made arrangements for the taking of the testimony of the other witnesses who had previously been aboard the "Sakito Maru" but who were no longer aboard, in the manner which I have set forth in the affidavit on file supporting this motion. In other words, we knew at that time, and had laid plans accordingly, where [970] these witnesses were, on what boats they would arrive at Los Angeles Harbor, approximately the date that they would arrive, and were making plans to obtain the depositions of those witnesses at that time, or at those times.

I must make the statement in answer to something the Court said, that while it is true that we all had apprehension concerning the developments of the international situation, I do not think any of us were in a position to foresee what was going to take place, any more than we can foresee today what is going to take place in the future. I certainly felt that these witnesses would arrive on these vessels. I must admit that I had no inside track to information issuing from the White House concerning the freezing order. It was certainly a surprise to me and I had no way of knowing that assets of Japanese citizens of this country would be frozen, or that retaliatory action would be taken in Japan by a simi-

lar freezing order, and that that would result in all trade between the two countries practically being discontinued. That has, of course, resulted in the cancellation of all the vessels sailing from Japan to this country, and, as a result, these witnesses who were scheduled to come aboard those vessels have not been able to come to the United States and it is for that reason the depositions could not be obtained.

Those remarks, if the Court please, I think are accurate and are just to supplement what the Court intended to add.

The Court: May I make this statement: The Court, in [971] any of its comments, is not indicating that counsel has not been diligent. I do not want to be so understood, that you have not been diligent. I assume that you had a right to rely, counsel, on the fact that your witnesses would be here at such and such a time, and to that extent, any comment I make is not to be considered any reflection on counsel. However, I feel this way: I feel that we have a statement as to the substance of their testimony; you also have their examination before an A Board, if you want to offer it, as either a supplement or a part of this statement. If you simply want to offer this, why, that will be your testimony on that. Of course, the other side, if there is anything contradictory in those statements or that testimony, of course, that is properly impeaching, may offer it. Of course, any testimony is subject to contradictory evidence.

Mr. Adams: If my participation in that situation can be without prejudice to my right to continue to urge the Court that the motion should be granted, irrespective of whether counsel would stipulate that they would testify in that manner, then I would feel free to express my position. I think the Court will appreciate that, by saying and agreeing with counsel that the witnesses would testify in this manner, I still wish to urge upon the Court that that is not yet satisfactory from our standpoint.

The Court: I can understand it is not. That probably is true from both sides, because if the witness were pres- [972] ent they would be subject to cross examination and might or might not hold up under their statements; so it works both ways in that respect. But here we have a situation of—how many liability cases are there altogether? There are eight death claims.

Mr. Adams: Yes; there are eight death claims.

The Court: And certainly those eight death claims and any rights that those parties may have can't wait until the international situation is ironed out.

Mr. Adams: I have some authorities, if the Court please, which I think may be helpful upon this subject.

The Court: I will be glad to hear from you.

Mr. Adams: One of the volumes is not in the library.

Mr. Montgomery, Sr.: We have not finished.

Mr. Harnagle: Mr. Adams has not answered the question which I put to him.

The Court: I think he made it clear before that he is not entering any stipulation. He is stating that they would so testify, and you people are offering to stipulate. The Court may take the position that, in view of the offer of the stipulation, the continuance will be denied.

Mr. Harnagle: My question to him is: Will he also make the testimony before the A Board a part of his offer? I can't see any possible reason why he should not do that.

The Court: Well, he said he would not so stipulate.

Mr. Adams: I will make it part of my offer, if the [973] Court please. I do not think it adds anything. I think the statements substantially cover the same ground, but I will offer the testimony of the three witnesses, Karasuda, Kanda, and I think it was Aona.

Mr. Harnagle: Whoever it was.

Mr. Adams: Before the A Board, as again illustrating substantially what the witnesses would testify to. I have the A Board transcript here containing the testimony of all witnesses who appeared before the A Board, but I certainly would hate to part with that transcript if we are going to still have to go to trial. I wonder if it could be stipulated that the offer is made, and that the transcripts need not be made a part of the record, because counsel undoubtedly have copies of those amongst them or can find a copy, and the A Board has the official copy.

Mr. Fall: May I suggest that at the time of trial it merely be read into the record? I do not believe the testimony is of so great a length of those three witnesses but what it could be read into the record.

Mr. Adams: I think that is correct.

Mr. Harnagle: I will agree to join in that stipulation with the testimony of the A Board.

Mr. Adams: I think that calls for other statements from other counsel, regardless of whether they have spoken before or not.

The Court: All of counsel, do you want the A Board [974] testimony of these three witnesses?

Mr. Cluff: If I may offer the original stipulation, I now offer to amend it, that the witnesses will also testify in accordance with the evidence given before the A Board, that is, the three witnesses who testified before the A Board.

The Court: Are there any counsel who object to that?

Mr. Stearns: On behalf of Grace E. Mayo we so stipulate to add to the stipulation offered.

Mr. Cluff: If anybody objects they might indicate an objection.

The Court: Nobody objected to that amendment.

Mr. Adams: If the Court please, there is just this difficulty with that: All the parties are not represented here.

The Court: I understand there are two parties not represented and one party has not stipulated, and I will take care of those after we get through with the main situation. But you said you had some authorities you wished to submit.

Mr. Adams: Yes; if the Court has completed the record on that particular point. One of the authorities I would like to call the Court's attention to is not in the library here, and I wonder if I could obtain it from your Honor's chambers, 246 Fed. Could I do it, or have the Bailiff get it for me? [975]

The Court: We will get the 246 Fed.

Mr. Adams: I would like in the meantime to call attention of the Court to a statement appearing in Volume 3 of Benedict, Admiralty (6th Edition), pages 109-110.

"If any postponement be desired by either party, on sufficient reason, it is granted by the judge. * * * The nature of maritime transactions is such that witnesses are often transient and their convenience as well as the necessities of the parties, often exercises an important influence in determining the mind of the Court in matters relating to the mere conduct of the hearing. * * *

"It is this flexibility of a Court of Admiralty, its power to adapt itself to the circumstances of the parties and their witnesses, without prejudice, and often with signal advantage to the cause of justice, that constitutes one of its great points of superiority over the courts of common law and over trials by jury."

I just wanted to illustrate by that quotation the power of the Court, sitting as a court of admiralty, with respect to granting this motion for continuance.

The Court: The thing that concerns the Court in this case is that you are not asking a continuance for 30 or 60 days, but you are asking for a continuance that might run into years, an indefinite situation. That is what concerns [976] the Court and makes the Court feel that perhaps it should do the next best thing under the circumstances. I know that anybody would prefer to have their witnesses present in person if it is possible, if they thought their witnesses would stand up.

Mr. Adams: I have no fear of that, and that is why I would like to have them here, if the Court please.

The Court: That is what I say.

Mr. Adams: I have here a case that deals with somewhat an analogous situation that arose during the last war.

The Court: All right.

Mr. Adams: It is not long. If the Court will permit me, I would like to read the facts. The case was before the Third Circuit, *The Kaiser Wilhelm II*, 246 Fed. 786.

“In this case *Harland & Wolff, Ltd.*, a British corporation, filed a libel against the *Steamship Kaiser Wilhelm II*, owned by the *North German Lloyd*, a German corporation, for repairs made to that vessel in libelant’s shipyard in England. By its answer, the *North German Lloyd* admitted the Admiralty jurisdiction of the court below and the premises, but contend-

ed such jurisdiction should not be exercised in the present instance, because the countries of both litigants were at war with each other, and that prior to the filing of this libel the Imperial Government of Germany issued a moratorium, whereby [977] payment of all indebtedness by German to British subjects was forbidden during the war. It was therefore contended that the present enforcement of this claim would compel such German subject to violate the law of its country, and thereby subject itself to pains and penalties. To this answer the British libellant filed exceptions which, in substance, alleged that the facts set forth in the answer did not constitute a defense to the libel. On hearing, the Court, in an opinion reported at 230 Fed. 717, sustained the contention of the North German Lloyd and subsequently entered a decree dismissing the libel. From such decree this appeal was taken. But pending such appeal, and at the hearing in this court, the whole situation was changed by two facts: First, the existence of war between the United States and the Imperial Government of Germany; and, second, the libeled ship, the *Kaiser Wilhelm II*, was taken over by the United States Government by the order in the margin."

The case then sets forth an executive order under which the ship was taken over.

"This being an appeal in admiralty, this court

has authority to consider the case de novo. * * *

And, of course, it will also take judicial notice of the change in situation noted above. That the court [978] below had jurisdiction of the subject-matter and of the parties, if it saw fit to exercise it, is assumed and the question before the Court was therefore as to the propriety of exercising such jurisdiction. Manifestly the exercise of jurisdiction by the courts of a neutral nation between citizens of belligerent powers is a delicate one, and in this case whatever course was followed there would be reasonable complaint by the unsuccessful litigant. For, while the German citizen could assert the enforcement of the claim compelled it to pay a debt its Government had forbidden it to pay, the British citizen could with equal weight complain that the German vessel had sought protection in an American port, it was enabled to do so through the very repairs the libellant made, the libellant had a lien for such helpful repairs on such vessel, that such lien might be lost if the cause were dismissed, and that it would be an unneutral act if it were turned out of court. Bearing in mind the further fact that the Kaiser Wilhelm II, even if this case were dismissed, could not have gone to sea for fear of capture, and that retention of jurisdiction in no way hindered, and dismissal of the libel in no way furthered, the use of the vessel by its German owners, we

are of opinion the court below should not have dismissed the [979] libel and that its decree should be reversed.

“Moreover, the two facts which have come to pass meanwhile, viz., the war with Germany and the taking over of the vessel by the United States Government, give further support to this conclusion, for the action of the Government, in taking over the libeled vessel, changed the practical effects of the decree prayed for, when the libel was filed, in that such decree is now enforced against the German citizens or its property, but in substance and effect would be, if a decree were finally entered as hereafter noted, against the vessel held by the United States. This vessel now taken by the Government as noted, may hereafter be lost, burned, or destroyed, and if the lien be not finally enforced against her in this proceeding, or the hold of the Court upon her be surrendered, it is manifest that the North German Lloyd might, after the war was ended, still remain liable to the libellant for the repairs on the ship, no matter what became of her. The practical effect, therefore, of our dismissing this libel, might eventually work a hardship to the North German Lloyd. So, also, the changed situation makes the British libellant’s nation and our own allies in this war, and it might well be regarded as a well-nigh hostile act on the part of the United States District Court to refuse to [980] exercise its

jurisdiction in behalf of a British citizen. It is manifest the ship cannot now be returned to the German subject, just as it could not have been really returned to such owner for use at any time since the libel was filed. Therefore there is no practical reason why jurisdiction should be declined on the ground that retention was an unneutral act, when we were at peace with Germany, or is now an unjust act toward the citizen of a country with which we are at war. The fact that the ship has now been taken from the possession of the Court by the Government would not prevent the Court from hereafter adjudicating the several rights of the parties litigant if possession of the ship should later be restored, or if the Government saw fit hereafter and of its own accord to pay into court such amount as would satisfy this lien. It is apparent, therefore, that no harm can be done to the two litigants or to the Government by the lower court retaining its jurisdiction of the libel for the present. If, as is no doubt the case, the counsel for the German claimant cannot at this time properly procure proofs and present his client's case, the Court can, and no doubt will, delay action until this can be done. On the other hand, retention of jurisdiction may afford a tribunal for hereafter [981] deciding questions which might possibly arise growing out of the seizure of this and other vessels by the Government, if the Government

should desire an adjudication by a court as last resort.

“This case is exceptional in its situation, and calls for the exercise of that range of discretion which the broad powers of a Court of Admiralty enable it to exercise. Such broad powers and range of discretion are, in our judgment, fittingly exercised by an order which will make due provision for, first, giving the German citizen and belligerent an opportunity to litigate his rights if relations with his country are hereafter resumed; second, providing for adjudging, if the Government hereafter so desires, its rights and liabilities, if any, in taking over libeled property of the German subject; third, adjudging hereafter what effect the taking of this ship by the Government had on the claim of the British lienor, and the further obligation of the German vessel owners as between themselves.

“In following this course, and protecting the unprotected rights of an absent German citizen while this country is at war with the Imperial Government of its country, we are impelled by three all-sufficient reasons: First, the innate sense of fairness, decency, and justice which respects the [982] rights of an enemy; second, the broad principles of international intercourse, which leads courts and nations that believe in international rights, to be the more careful to observe them toward belligerents; and lastly, because the awarding to this German citi-

zen, with whom our country is at war, the careful preservation until times of peace of its rights is in line with those high ideals of Anglo-Saxon justice which led the British courts years ago, in *re Boussmaker*, 13 Vesey, 71, decided in 1806, to allow the claim of an alien enemy to be proved in time of war and in the dividends held by the British court until peace. Indeed, the fact that our country is now at war with Germany is all the more reason why this Court should most scrupulously award to this German citizen those international and equitable rights which no fair-minded people ever deny even to their enemies in times of war.

“We are therefore of opinion the decree of the court below should be reversed, the libel reinstated, with leave to the court and parties to take further steps and proceedings in the case as are not at variance with the views above indicated, and that a certified copy of this opinion be furnished by the Clerk to the State Department and the Department of [983] Justice of the United States.”

If the Court please, it seems to me that if a Court should be actuated by that sense of decency and fairness with regards to a citizen of a country with whom this country is at war, it should be similarly guided, certainly, with respect to a citizen of a country with whom we are not at war, but with respect to which normal relations and normal means of intercourse do not exist.

I intend to prove that no N. Y. K. vessel has arrived at the United States since the early part of August; that letters written from Japan as late as, I believe, June or July 25th have only arrived at the Los Angeles office of N. Y. K. this morning, so as to indicate the lack of correspondence and means of correspondence and communication by mail between these two countries; and I intend to prove by a witness that the scheduled sailings of these vessels which have been enumerated in my affidavit have been canceled.

The Court: I think the Court would almost take judicial knowledge of the fact that these witnesses who had not left Japan before the present strained relationship developed could not arrive; but it is my understanding that it is more or less of a common practice in admiralty, that is, in any litigation, that where a person asks for a continuance on the ground that a witness is missing—I think you have five or seven—which is it?

Mr. Adams: Six. [984]

The Court: —Six witnesses.

Mr. Adams: I might explain that there are seven, with the captain of the boat, to get here.

The Court: —Where there are witnesses missing, it is a common practice for a person making the motion to set forth the substance of that testimony and its materiality to you in court. Here it develops that these witnesses, in substance, would testify as set forth in their statements and the opposing counsel are willing to stipulate that if they were present they would so testify. Whether it is strained

relationship or whether it is the ordinary litigation, that would be sufficient upon which to deny a motion for a continuance. If it had not been for the fact of this stipulation it would be a very serious question in the Court's mind as to whether it should not be continued, irrespective of the fact that the Court feels that these people are entitled to their day in court; but in view of that stipulation I feel that the motion for a continuance should be denied.

However, I will say this, that in the course of trial, if testimony comes out that it develops that the immateriality is such that the Court feels it would be advantageous to the Court to have the parties present, the Court may continue the case then for an opportunity to get the depositions of those parties. I do not know at this time to what extent this testimony is cumulative. It may be that part of this [985] testimony is cumulative. It was suggested the other day, you remember, when we discussed it, that it might be, some of it, cumulative. Whether it is or not I do not know until the evidence is in. But I feel, in view of the fact that there are so many people involved in these cases, death claims of eight people, that the question arises: Are they going to be deprived indefinitely of any right they have of recovery?

Another query is as to whether or not the "Sakito Maru," the N. Y. K. line has not had full opportunity of having the depositions of these witnesses taken.

And third, in view of the fact of the offered stipulation by all but three of the parties, I think that as

to those parties who have stipulated the motion for a continuance should be denied. If the other three parties do not stipulate within 48 hours, I am going to continue those three cases.

Mr. Adams: In order that our position may be clear, if the Court please, I wish to state for the record that I agree that the witnesses would testify substantially as shown in those statements, and that with respect to the three witnesses who testified before the A Board, that they would testify substantially as they did before the A Board, as shown in the transcript of that testimony. By agreeing to that, as previously mentioned, I do not wish to prejudice my position with regard to urging upon the Court that, irrespective of the counsel's willingness to stipulate that, we are [986] still entitled to a continuance, and I think I should resist the——

The Court: I understand your position to be that it is always better to have the witnesses present; that the Court has an opportunity of observing the witnesses and observing the method of their testimony, and also he is in a better position to judge of the witness' credibility.

Mr. Adams: Correct.

The Court: And also, that additional details which might add strength to his testimony would be present and of advantage to the Court and to your client in presenting its side of the controversy. I understand your position. At the time of the trial, these statements, if offered as their testimony, will be recognized by the Court as their testimony and any counsel raising any objection to it, his case will

be continued indefinitely until the normal relations are resumed with the Far East.

Mr. Adams: I would like to make one further statement, if the Court please, on this subject of a continuance. We have just been served—and when I say “we,” I really mean the N. Y. K. line has just been served—with a copy of a libel in a new case that has been filed just a few days ago. Service was made on September 3rd, I believe, in San Francisco. It is a suit for personal injuries by someone who, I believe, was a passenger aboard the barge, for \$5,000. The precise situation will not be learnable for some time on that. The [987] case can’t possibly be at issue before September 16th.

I wish to also call the Court’s attention to another feature which I think has quite a bearing upon the subject of a continuance, and that has to do with the limitation proceedings. Mr. Cluff and I intended to ask the Court to rule upon several questions we have had before your Honor before. I do not believe they were upon the Court’s calendar, but we want to call an informal conference, and we are prepared to bring them up here today. One of those matters is a motion by Mr. Cluff to vacate the order that the Court has previously entered, I believe on June 30, 1941, requiring a surrender of the shore boats. He has also moved that process shall issue——

The Court: These are matters just between you and Mr. Cluff, are they not?

Mr. Adams: Yes. And I wanted to illustrate——

The Court: I want to say that those other mat-

ters I will have to take up at probably 4:00 o'clock this afternoon.

Mr. Adams: I see.

The Court: Because I have a criminal calendar awaiting and a large number of defendants present. Those matters I will take up later.

Mr. Adams: May I indicate how that might affect it? I don't care to argue it now.

The Court: I want to give you a full opportunity to be heard on this present motion. [988]

Mr. Adams: If the Court vacates this prior order, issues process in that limitation proceeding, that process will be in the form of a monition directed against all parties who have a claim against the Hermosa Amusement Corporation or have a suit against the Hermosa Amusement Corporation. Those parties, under the United States Supreme Court Admiralty Rules, will have 30 days within which to file a claim. They will also, after filing claim, have a right to contest that petition by filing an answer to the petition and contesting either the petition to limit liability or to exclude the Hermosa Amusement Corporation liability or both. Those matters cannot conceivably be brought to issue before September 16th. If they are not, then this monition stands against all of these claims and actions against the Hermosa, and that monition, incidentally, is a statutory injunction. I take it, then, at the coming trial, if that monition issues all of these actions against the Hermosa will be settled and all these parties will be permitted to proceed against the N. Y. K. line and "Sakito Maru" alone, or else the Court will permit another trial on

the limitation proceeding at some time in the future, and all this matter will have to be gone over again then.

Now I urge that situation upon the Court as having a vital influence upon this motion for a continuance at this time.

The Court: I think there is considerable merit to your [989] position there. I have felt that it has been unfortunate that the matter is not at issue. I would like to hear from the other side on that. I am rather inclined to feel that this case should not go to trial until it is completely at issue and until you people quit playing and going around. When I say "playing and going around," I mean what you have to do before you get down to business.

Mr. Briney: I failed to *anticipate* a while ago because I had not read those statements. I have read them since and while the Court was making a few remarks a while ago, I was telling Mr. Cluff I was willing to enter the stipulation.

The Court: In the same matter, I believe the case of Lucy Sylvester was not called, No. 1155.

Mr. Allen: For Philip L. Wilson, we will so stipulate.

Mr. Montgomery, Jr.: May I also make a statement? So far as the case of S. P. Reynold, (?) which is the case Mr. Adams refers to as not being at issue, I will make the stipulation now. I don't know whether we can get this worked out before the time of trial or not.

Mr. Cluff: If the Court please, with respect to the limitation matter, that is something that seems really to relate only to counsel.

The Court: Here, let us get right down to business. I do not want to have to continue this motion and make all you gentlemen come back, but I can only hear you a few minutes more because I have a long criminal calendar here. [990] Mr. Adams points out that your case is, in one sense, really not strictly at issue.

Mr. Cluff: The limitation case, that is perfectly true, your Honor, but I have avoided the usual sequence in that situation. Pleading the limitation in our answers to this case, I have proposed not to ask for process in the limitation case, so there will be no injunction or until the issues of libaility have been determined here. Then, if the situation calls for it, we can use the limitation proceeding as an administrative procedure. If the decision be another way, the question may be entirely removed.

The Court: I know, but the question I want to know is this: I don't know anything about admiralty, as I am waiting for all you gentlemen to teach me, and I think there are others who are going to be taught some things as we go along, too, maybe some teaching from both ways. What I want to know is whether the case is at issue.

Mr. Cluff: On the question of liability, I take it that is what you mean?

Ths Court: Mr. Adams says not.

Mr. Adams: It is not at issue in any respect, if the Court please.

Mr. Cluff: I say Mr. Adams is entirely wrong.

Mr. Adams: Just a minute now, if the Court please. We are talking about the limitation of liabil-

ity proceedings, if they are at issue. No process has issued, no one has [991] filed a pleading, no one has filed a claim, no one has filed an answer or even exception to the pleadings. How could it be at issue?

The Court: Then we could try all the cases except the "Olympic"?

Mr. Cluff: We could try the "Olympic" case. Mind you, that limitation proceeding is absolutely ineffective until process issues. We have cases here pending; they are set for trial; all issues in the case, including limitation, have been arranged or will be arranged by answer before we get to trial here. That is just a smoke screen. There isn't a single issue on the question of liability in this case, or on the question of liability in this case, or on the question of the damages that cannot be litigated in the cases now pending and urged to trial.

Mr. Montgomery, Sr.: I want to tell your Honor that we are at issue and we are not interested in the limitation.

The Court: I am not going to try one of them unless I can try them all.

Mr. Montgomery, Sr.: We have four cases in ours.

The Court: There is no use to take up the time of the Court to hear the case twice. By the time I have heard it once——

Mr. Cluff: There is nothing on earth to hear twice because the issues are tendered and traversed in this case. The decision of this court will be res judicata of any limitation proceeding or anything else. [992]

Mr. Adams: It won't be unless counsel stipulates to it. If counsel is going to keep that petition for limitation on *trial*, and then after this case is all over, he will try the limitation proceeding. Now, just how does he expect to have the issues in that case determined by the pending action?

Mr. Cluff: I will stipulate with you on that hearing now.

The Court: Isn't it true that under the limitation proceedings the Court is not in any position to pass upon it until it hears evidence and determines whether or not there was personal knowledge there, depending on the nature of the negligence or omissions of the "Olympic II"? And it depends upon the character of those omissions as to whether or not the petition should be granted?

Mr. Adams: That is perfectly true. Counsel is right in this respect: That he has tendered the issue of the limitation by setting it up as a defense to his answer. Nevertheless, the limitation proceedings are still left on file. What is to be done with them eventually? How are they going to be determined by what the Court does with respect to that defense?

Mr. Cluff: Let me ask you this question, Mr. Adams. What conceivable effect can that have upon this proceeding or the effect of a judgment?

Mr. Adams: They could have if a monition were issued. [993]

Mr. Cluff: The monition is not going to be issued because I am not going to ask for it.

Mr. Adams: I am not arguing with you on that

point. You, for the first time, have made the statement in court.

Mr. Cluff: I wrote it to you last week.

Mr. Adams: I might point out, if the Court please, that is part of his written motion on file here. Would you like to see it?

Mr. Cluff: No. I am asking the motion, but I am going to ask the Court to postpone the ruling on it.

The Court: I am going to continue the preliminary matters until 3:45, but I am going to take the matter of the continuance under advisement until I hear more from you on this question of being completely at issue.

Mr. Montgomery, Sr.: Did your Honor notice that Mr. Cluff was going to make the stipulation with Mr. Adams?

The Court: Yes. But I don't know enough about this to know what the offer means. Confession is good for the soul sometimes, but as far as these limitation proceedings are concerned, that is the first one I am having trouble with in following counsel. They talk about having a motion issue. They talked about that three months ago. Now they are talking about it again today, and I don't know, but I feel that, under the general issues, the motion for a continuance on the grounds I have heretofore stated should be denied, without prejudice. And I am going to take this [994] position, that in the course of trial if it develops that some point resolves around the testimony of an individual, and if it then appears more important than it does at this time, that either

an opportunity will be given for the taking of deposition or getting the witness present. How important these witnesses are I can't tell until the case is tried and the evidence is before me, whether it is simply cumulative and what we have in that respect. Certainly if it develops that a trial at this time will result in any unfairness to the N. Y. K. and "Sakito Maru", then the Court is going to consider the matter of continuance in a different light. I feel, however, they should have a full opportunity to be heard. This is a serious matter, a lot of money involved, but I can't help but feel that the testimony as to what transpired to the "Sakito Maru" is exclusively within their knowledge, and that if they had one witness or 50 witnesses there who would testify, there would be no way of contacting them; and the same is true so far as the "Olympic II." The witnesses on the "Sakito Maru" do not know what happened on the "Olympic II," except, as far as I can see at this time, that they did not hear any fog signal.

The other motions, gentlemen, will be continued until 3:45. That you and Mr. Cluff have to fight out with the Court.

Mr. Adams: We have the motions in the death cases, if the Court please. Are they continued to the same time? [995]

The Court: Those are going to have to be submitted. I have not had an opportunity of examining them and I do not know just when I shall. I have another trial tomorrow.

Mr. Adams: I know you do.

The Court: And it will probably take all week. I think if anybody has any authorities that they want to submit in that matter, submit them to me within the next three days and I will try to be able to rule on it as quickly as possible.

Mr. Montgomery, Sr.: Your Honor cannot rule on it until we have the question of fact determined.

Mr. Adams: That is true. There is evidence on the point of the locus of the collision that is furnished by about three or four pages from the deposition or the coast guard officers.

The Court: Didn't I understand that as to the locus of the collision there was no dispute over it?

Mr. Adams: I don't know. Someone said this morning he had some testimony to offer on it. I think a matter of 100 yards or 500 yards, why, that will be inconsequential because it is still within the area that we call our territorial waters of the State of California. We can't get into a serious factual dispute, in other words.

The Court: May I ask if there is any dispute as to whether the Federal or the State death rule applies?

Mr. Montgomery, Sr.: There is. I don't know, myself, yet which rule applies. [996]

Mr. Harnagle: We are not prepared to concede that the Federal rule does not apply, your Honor.

The Court: Mr. Adams, I am not going to pass upon this until we hear evidence on this.

Mr. Adams: If the Court please, we have introduced, or rather, we based our motion upon evidence

to establish the locus of the collision. This is a jurisdictional question we are raising which can be raised, I take it, at any time, and we have evidence here to satisfy your Honor as to the location of the collision. Once that simple point is established, all the rest becomes a matter of law and we are prepared to argue it.

The Court: What difference does it make whether it is decided today or two weeks from today?

Mr. Adams: Well, other than the fact that we have a lot of money posted as collateral on our bonds.

The Court: Yes. But you are asking for a continuance and asking these people to wait for their money. I don't know what difference it makes. I think it is six of one and half a dozen of the other.

Mr. Adams: Of course, if the Court please, I am not prepared to say that they are entitled to get any money. I mean that is what our issue is.

The Court: I know.

Mr. Montgomery, Sr.: We are, we are.

The Court: Of course, that is what we are having this [997] trial about.

Mr. Adams: That is right.

Mr. Harnagle: Answering your question as to what difference, whether it is decided today or two weeks from today, I can't see that it makes much difference.

Mr. Adams: If Mr. Harnagle has \$240,000 that he does not mind letting lie around some place and could not use, that doesn't make any difference, but I will tell you that the N. Y. K., because of this frozen assets order, can use it very well.

Mr. Harnagle: And the whole purpose of the motion is to draw the money away from these libelants.

The Court: If they are not entitled to a bond, of course, there is no argument about that. If they are not entitled to the bond, they are entitled to have it released. I am not going to try that one issue ahead of the trial. If you gentlemen will submit your authorities to me within three days I will try and be able to satisfy myself as to the law. At the time of trial and when we get into the trial and it is determined then that the death statutes of California apply, under such statutes you are entitled to the release.

Mr. Adams: We have submitted our memorandum. If a counsel submits a memorandum within three days may we have another three days to answer their memorandum?

The Court: Yes. [998]

Mr. Adams: We are the moving party.

The Court: Yes. And we will continue the battle between you and Mr. Cluff at 3:45, Mr. Adams.

The gentlemen who did not stipulate and are not present, unless they file a written stipulation within 48 hours I am going to continue those cases.

Mr. Montgomery, Sr.: Who has not stipulated?

Mr. Stearns: Who have not stipulated?

The Court: You gentlemen will have to get that from the Clerk. I have other business to take up, gentlemen.

[Endorsed]: Filed Jun 22, 1942 [999]

TESTIMONY AND PROCEEDINGS
ON TRIAL

APPEARANCES:

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gomery, by his guardian ad litem, Margerie L.
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APPEARANCES: (Continued)

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by

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nard McGrath, deceased; Helen McGrath, as
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EDWARD C. PURPUS, Esq., and

CHARLES C. MONTGOMERY, Esq.,

For Intervening Libelants Norma Rubin, Lena
Karsh, Florence, Lillian and Shirley Rose
Karsh, by Lena Karsh, their mother and guard-
ian ad litem; and Lena Karsh, as Administra-
trix of the Estate of Joseph Karsh, deceased.

H. C. VELPMEN, Esq.,

For Intervening Libelant S. T. Elliott.

APPEARANCES: (Continued)

WRIGHT & MILLIKAN, by
CHARLES E. MILLIKAN, Esq.,
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FRANK L. STEARNS, Esq., and
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For Libelant L. R. Ohiser.

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R. VIRGIL ALLEN, Esq.,
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HARVEY R. McKEE, Esq.,
For Libelant Wilfred Rasmussen.

Los Angeles, California
Tuesday, September 16, 1941,
10 a. m.

The Court: Call the cases and see if everybody is ready.

(Whereupon the clerk called the various cases and noted appearances as set forth herein.)

The Court: We do not want to proceed unless all are represented, and I am going to find out why the gentleman can't be here on time. I want to state to you group who are here, that 10:00 o'clock means 10:00 o'clock, and with this large group we are not going to be very considerate of those who

are late, because we are going to go ahead and if the attorneys cannot be here in time the court may impose whatever fine it may consider necessary to help counsel to attend to the business of the court and of their clients. Here is a libelant not even represented. I am going to ask some counsel who knows him to step into my secretary's office and call his office on the telephone and find out what the trouble is, because if he is not here and they are not going to be represented, I believe the court should dismiss it for want of prosecution.

Mr. Cluff: I will be glad to call him.

The Court: All right; just step right in.

Mr. Adams: If the court please, I may have missed it, but I did not hear a response in these two cases: J. Eldon Anderson and Wilma Greenwood. [2*]

Mr. Velpmen: For S. T. Elliott is present.

Mr. Purpus: I answered for Wilma Greenwood.

Mr. Adams: Yes, thank you.

I have one or two matters, if the court please, that I do not believe involve Mr. Cluff that we might take up at this time. I have a stipulation here dismissing the amended libel in rem in the case No. 1155, the libel of Lucy Sylvester. There was no jurisdiction obtained of the vessel, and in that action is based upon a claim for wrongful death and is in personam.

The Court: It is purely in personam then?

*Page numbering appearing at top of page of original Reporter's Transcript.

Mr. Adams: That is correct. It calls for the order of the court dismissing the libel in rem.

If the court please, within the last week or ten days, I believe it is, there has been a libel filed in personam in behalf of a personal injury claimant by the name of Elliott. Service of citation was made upon an official of the N. Y. K. Line at San Francisco. We, of course, have more time to answer, but we have agreed to put in an appearance and have agreed that the matter might be tried here so that all cases will be tried together.

The Court: Is that 1296?

Mr. Adams: It is 1138, intervening libelant S. G. Elliott. Counsel for Mr. Elliott have agreed that we will not have to put up a cost bond and we have a stipulation to that effect, if the court would be pleased to execute it as [3] an order. Then we also have talked to Mr. Cluff, and I would like to have his statement for the record that, while we are filing an answer to the libel, we have not yet prepared and filed a petition under the 56th rule bringing in Hermosa Amusement Corporation and Captain Anderson. Mr. Cluff has told me prior to the meeting of the court that that would be agreeable. We can file it later or it could be probably the same as in other cases.

I might call on Mr. Cluff now to explain his position on it.

I am talking now about the Elliott matter, our 56th rule procedure in that case.

Mr. Cluff: Oh, I will stipulate with Mr. Adams

that a reply petition or anything he wants to file may be deemed filed, and we will go ahead with the trial; and you give me any pleadings you have in the case within a reasonable time.

Mr. Adams: That is agreeable.

Mr. Cluff: And the issues will be the same, I suppose, as are made in the other cases?

Mr. Adams: Yes.

Mr. Cluff: I will stipulate we may go ahead with the trial of that case, without the formality of serving formal pleadings. I will ask leave to answer that part of it that comes before me, and I will just ask leave to answer it at the time I can get a copy of the complaint. [4]

Mr. Adams: I am offering the answer to the libel to the clerk at this time for filing.

Mr. Cluff: I just got hold of Mr. Reay, Mr. Scharf's partner, he said he had left for court and had one matter in the probate court to attend to, and Mr. Reay said, by all means, for us to go ahead.

The Court: Now, gentlemen, I understand that each side has more or less selected its own generals to direct these matters. I want to know whether we are going to be confronted with each attorney putting in his own objections, or whether the attorneys for the libelants have selected on one or two individuals that will speak for them in going into the question of liability. You all understand that the court at this trial is going to first determine the matter of liability, and after that has been determined there will be further hearings on other matters involved in litigation.

Mr. Montgomery: I may say, speaking for the libelants, that we have selected Mr. Cluff for our spokesman.

The Court: Do I understand that when Mr. Cluff puts in an objection, it will be stipulated that the objection goes to the benefit of all the libelants?

Mr. Stearns: That is true, except that Mayo has sued the Hermosa also. In other words, we would not want to put Mr. Cluff in a bad position, but we have sued him also, and I think two others as well. Otherwise, we are agreeable. [5]

Mr. Cluff: Some of these gentlemen have been good enough to ask me to present the case on the issue of liability as between the two vessels but, as Mr. Stearns pointed out, a number of these people are adverse parties; that is, in all of these cases we have been brought in as third party respondents. So far as the facts and circumstances of the collision are concerned, I will try to carry the ball to the best of my ability.

The Court: As I understand we are going to try at this time, you might say, the two vessels?

Mr. Cluff: I want to put in the best case I can, but I don't want to foreclose anybody by any sins or omissions of mine from supplementing or putting in their own case. I don't want to take that responsibility.

The Court: Everybody will have his day in court, but I don't want, every time an objection is made, eight other lawyers to jump on their feet and put in the same objection.

Mr. Cluff: We had some discussion, during the taking of the depositions, and I think we all agreed that every time an objection was made, we would all avail ourselves of it.

Mr. Adams: I think that was subject to this qualification; that it was open to anybody who did not want to object, to dissent; as it might be, one party would want the evidence for his own purposes, and unless he gets up, and [6] so states, it will be deemed an objection which goes to all—unless he disclaims the objection.

The Court: The court has studied with considerable care the pre-trial statement filed by Mr. Adams, and the one filed by Mr. Cluff, and it seems to me that there should be some preliminary stipulations between you gentlemen, as to certain facts, upon which to approach this litigation. In other words, the place of the collision is not in dispute; I understand there can be no dispute as to the size of the vessel—of each vessel, and the physical facts. That you people can agree upon, and I should think it ought to be stipulated rather than to take up time going over it with a number of witnesses, so that we can get right down to the real matters in controversy.

Mr. Adams: It seems to me these preliminary matters can be stipulated and best handled by an understanding Mr. Cluff and I reached before court opened this morning. So far as we are concerned, these preliminary matters, such as the dimensions of the vessels, and so forth, I will allow Mr. Cluff considerable latitude in asking leading questions, and he

will do likewise with me, and in that way I think we can cover the ground very rapidly, and I think it will take less time than to work out a stipulation.

Mr. Cluff: I agree with Mr. Adams on that.

The Court: Let us proceed.

Mr. Adams: I have one or two preliminary matters, which [7] I haven't had a chance to raise, in connection with Mr. Cluff acting as spokesman for the other libelants, and I would like to have the record show that he will bind the other libelants by any stipulation unless they make objection.

The Court: I understand that a stipulation has been entered into that the others, by their silence, acquiesce, and that stipulation will be deemed the stipulation of all.

Mr. Adams: As I recall, the records in these cases were transferred to this court, but there was no formal order of consolidation made, and I think in the interest of the court's convenience that a final order of consolidation should be made of all these causes, and I so move.

Mr. Cluff: I join in that motion of consolidation except as to limitation proceedings which is not at issue.

Mr. Adams: I think, of course, that it should be retitled.

Mr. Cluff: I move that we use the original title, 1138-B.H.

Mr. Adams: I have no objection.

The Court: It is ordered that they will be consolidated, and for the purpose of convenience, the

action now being tried will be entitled the same, 1138.

Mr. Adams: I wish to have the record show that I have in the court room, and am producing, all the log books of the "Sakito Maru," the recordings, the gyroscope, [8] compass, and working navigation charts of that vessel. They are in the court room, and are produced by N. Y. K.

Mr. Cluff: I take it that no good purpose will be served by an opening statement.

The Court: No; I have reviewed the hundred page pre-trial briefs and that should cover it. [9]

JOAKIM MARTIN ANDERSON,

called as a witness on behalf of the libelants, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Cluff: State your name.

A. Joakim Martin Anderson.

Q. Captain Anderson, you are president of the Hermosa Amusement Company, and were the registered master of the barge "Olympic II"?

A. Yes.

Q. What papers do you hold from the Bureau of Navigation?

A. Unlimited master's papers, any ocean, any tonnage, and first-class pilot, San Francisco Bay.

Q. You have held that ticket how long?

A. 20 years.

Q. The dimensions of the barge "Olympic" I will just run over, and just correct me if I am wrong in any particular. She was built of iron in 1877?

(Testimony of Joakim Martin Anderson.)

A. Yes.

Q. A three-masted sailing vessel originally?

A. Yes.

Q. She was cut down, about 1934, to a barge?

A. Yes.

Q. She was 258 feet long between perpendiculars, and [10] 38 feet beam? A. Yes.

Q. Over-all a little longer, on account of the cruiser bow and the bowsprit? A. Yes.

Q. 22.6 feet deep? A. 22.8.

Q. 1776 gross tons? A. Yes.

Q. 1414 net? A. Yes.

Q. Dead weight 2500 to 3,000 tons? A. Yes.

Q. I want to show you, Captain, two photographs of the barge "Olympic". I will ask if this photograph which appears to show her port side is a substantial representation of the "Olympic" as she was at about the time of this collision?

A. It is, yes.

Q. Except for the people aboard, of course?

A. Yes.

Q. That shows the vessel's port side?

A. Yes.

Q. As she was lying at that time at Redondo?

A. Yes.

Mr. Cluff: I offer this in evidence, and ask that it [11] be marked—in marking the exhibits, may I suggest that we have so many by-named parties as between the "Olympic" and the "Sakito" that we number the exhibits "Olympic" 1 and "Sakito" 1?

Mr. Adams: That will be agreeable.

(Testimony of Joakim Martin Anderson.)

Mr. Cluff: I will offer the photograph in evidence as "Olympic" 1; the photograph showing the port side.

The Clerk: That is "Olympic" 1.

Q. By Mr. Cluff: It has already been marked in evidence before the Commissioner. I show you another photograph, Captain, showing the same vessel, showing the port bow and the port side.

A. Yes, sir.

Mr. Cluff: I will ask that this be marked "Olympic" 2.

Q. Captain, I am showing you a blueprint, showing the deck plan and profile of a vessel, which I have already shown to Mr. Adams, and I will ask you what that blueprint represents?

A. That blueprint was made for the benefit of the United States local inspectors in San Pedro, in '39, whereby they wanted to know——

Q. Never mind. It was made for them?

A. Yes.

Q. Made by whom?

A. The Bell Ship Service, San Pedro.

Q. Is the structure shown in this blueprint the same [12] as the structure of the vessel at the time of the collision? A. Exactly the same.

Q. I notice that the bell is shown in this on the top of the poophouse. Was the bell in that position at the time of the collision?

A. No, we moved it down here to the fore part of the house, where it was more convenient to get to.

Q. At the time of the collision the bell was located where?

(Testimony of Joakim Martin Anderson.)

A. Right here, at the fore part of the house, in the center.

Q. Was it over the keel? A. Yes.

Q. Fastened to a bracket on the house?

A. Yes.

Q. Will you take this lead pencil and draw a little cross just where the bell was located?

The Court: Mark it A for the purpose of identification.

Mr. Cluff: The witness has drawn a cross at the house at the point marked A. I will offer the blueprint in evidence as "Olympic" 3.

Mr. Adams: I won't object to the blueprint going in from the standpoint of showing what is on the blueprint. Various markings have been identified, but I would like to have a wide latitude in examining the Captain about the blueprint. [13]

Mr. Cluff: I will state this, that the only purpose was to have something to which we could refer from time to time as the Captain is on the stand.

Q. Captain, describe the "Olympic's" bell?

A. The "Olympic's" bell was 14-inch bell.

Q. When you say 14-inch, how do you mean?

A. I mean 14 inches in diameter, made of bell metal, like all other ships' bells.

Q. A regular ship's bell? A. Yes.

Mr. Adams: I move that the latter portion be stricken, all other ships' bells, as a conclusion of the witness.

The Court: It is his conclusion.

(Testimony of Joakim Martin Anderson.)

Q. By Mr. Cluff: Describe the bell a little more. What was it composed of?

A. The bell has a clapper in it, whereby we ring it in foggy weather while we are at anchor. Also the time on board ship.

Q. How was the bell rung?

A. It was a continuous ring.

Q. I mean by what means did you ring the bell?

A. By a clapper.

Q. Did you reach hold of the iron clapper itself, and ring it?

A. No, we have a bell rope on the clapper.

The Court: It is operated by hand? [14]

A. Yes, your Honor. The bell rope is made fast to the end of the clapper, and you get hold of the bell rope, and ring it continuously, your Honor, for about 5 seconds.

Q. By Mr. Cluff: That bell was 14 inches in diameter? A. Yes.

Q. And was located at the point you located on the blueprint? A. Yes.

Q. Right over the keel? A. Yes.

Q. You were not on board the "Olympic" at the time of the collision? A. No.

Q. Where were you?

A. I was going uptown on ship's business.

Q. Who constituted the crew of the "Olympic" on the morning of the collision?

A. We had a crew of three aboard.

Q. Tell the court who they were, and what their capacities were.

(Testimony of Joakim Martin Anderson.)

A. Mr. Ohiser, he was night watchman; Mr. Culp was the bait boy, and Greenwood the ship's keeper.

Q. In addition to this crew, there was a concessionaire aboard, who had his own staff?

A. Yes. [15]

Q. He was not employed, he nor his staff were employed by the "Olympic"? A. No.

Q. Or by the Hermosa Amusement Company?

A. No.

Q. What was the place of anchorage of the "Olympic" on September 4, 1940?

A. She was three and a half miles southeast by south, a quarter south from the breakwater, magnetic.

Q. That would be between 160 and 162 true?

A. Yes.

Q. And three and a half miles?

A. About three and three-eighths or three and a half.

Q. Is that an estimate or do you know by computation? A. I plotted it off on the chart.

Q. You plotted it yourself? A. Yes.

The Court: I notice the coast guard fixes it as 3.3 miles.

Mr. Cluff: I think the coast guard's figures are pretty close to right.

The Court: I understand the location of this was agreed; that there is a marking there today as to where the wreck was.

Mr. Adams: I am agreeable to accepting the

(Testimony of Joakim Martin Anderson.)

findings of the coast guard as to the location of the barge. [16]

Mr. Cluff: I don't know that I want to stipulate their location is 100 per cent right, because they did not take it until after the collision, after the ship was sunk; and there is no dispute that it was somewhere around three and 3 tenths miles off the break-water.

The Court: If you can't agree, go ahead.

Q. By Mr. Cluff: By what ground tackle was she anchored?

A. Well, she had a 6000-pound anchor, a two-and one-quarter inch chain, and seven shots, which is 630 feet long. She had 300 feet of stern chain, which is one and a quarter, and a 1200-pound anchor.

Q. The first anchor you spoke of was the bow anchor? A. Yes.

Q. The second one the stern anchor?

A. Yes.

Q. What was the purpose of the stern anchor?

A. To keep the ship from swinging, so that the people would not get seasick when they were out fishing.

Q. In what direction was she headed—in what direction was she held headed by the anchors?

A. Headed west.

Q. That was into the generally prevailing swells?

A. Yes.

Q. Did she have any room to move at anchors?

A. We kept the stern pretty tight, but the tide

(Testimony of Joakim Martin Anderson.)

going [17] north and south, she would move about a point each side; that is, two points altogether. [18]

Q. That is, either the stern or bow might move?

A. Yes.

Q. When you refer to a point, you mean the point of the compass, not degree?

A. A point is 11 degrees, and a quarter, 15 minutes.

Q. There were other barges in this area?

A. Yes.

Q. What other barges?

A. The "Point Loma", and the "Rainbow" barge.

Q. When was the "Olympic" anchored?

A. May 9th.

Q. 1940? A. 1940.

Q. At that time were other barges in place?

A. Yes.

Q. When the "Olympic" was fixed at her anchorage, how did the "Point Loma" bear from her?

A. The "Point Loma" was right in line, between the "Olympic" and lighthouse and breakwater.

Q. That is, she was in shore, the "Olympic"?

A. She was inshore.

Q. About abreast, almost bow to bow?

A. Yes.

Q. How about the "Rainbow"?

A. The "Rainbow's" stern was about half a mile or two points, that is, the stern, on the starboard side. [19]

(Testimony of Joakim Martin Anderson.)

Q. On the starboard quarter, two points from the stern? A. Yes.

Q. About half a mile distant? A. Yes.

Q. How was it between the "Point Loma" and the "Olympic"? A. About 1,500 feet, sir.

Q. Captain, this morning at your direction, we marked little drawings designed to show the relative positions of the three barges. The breakwater light is in a direction toward the bottom of the sheet; the "Olympic" is indicated by the shape marked "Olympic"; the "Point Loma" by the shape marked "Point Loma" and the "Rainbow" by the shape marked "Rainbow" Barge. Are those the relative positions, without regard to scale, and the relative sizes of the vessels—but the relative positions of the three barges? A. Yes.

Mr. Adams: Just a minute before the witness answers the question. I understand the diagram is not drawn to scale; it does not purport to show the distance between the barges.

Mr. Cluff: We purposely used models of the same size, and rather distorted distances so that no claim could be made that there was any attempt to draw it to scale.

Mr. Adams: Nor is there any claim as to the correctness of the bearings of the two barges from the "Olympic"; it is only an estimate?

Mr. Cluff: That is approximately a two point bearing; [20] the other two were approximately abreast.

(Testimony of Joakim Martin Anderson.)

Mr. Adams: Have you attempted to lay out the positions of the barges according to the bearings, by using any device?

Mr. Cluff: Just an ordinary protractor.

Mr. Adams: You have used a protractor on this diagram?

Mr. Cluff: We used a protractor, laying out just approximately. Let us do it right now.

Mr. Adams: All I want to find out is what it purports to be.

Mr. Cluff: He has testified that it was a two point bearing, from observation. We will see what sort of a bearing we have got here. That is about a point and a half, back there.

Mr. Adams: Of course, the diagram does show the direction of the lighthouse?

The Witness: Yes, roughly.

Mr. Cluff: The direction of the breakwater light.

This is very rough; it just gives the relative positions in relation to each other.

Mr. Adams: Under those conditions I have no objection.

The Court: It will be admitted in evidence.

The Clerk: "Olympic" No. 4.

S.
x

Reyl. Clerk
7-10-17.

Mr. [unclear]
[unclear]

Exhibit
[unclear]

J.
x
[unclear]

[unclear]

No. 1138-1941
[unclear]
4
SEP 16 1941
[unclear]

No. 1111-1941
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED

JUL 13 1942

PAUL P. O'BRIEN
CLERK

(Testimony of Joakim Martin Anderson.)

Mr. Cluff: No further questions.

Cross Examination

Q. By Mr. Adams: How long has the Hermosa Amusement Corporation owned the Barge "Olympic"? A. Since 1934—1933. [21]

Q. How long have you been president of that corporation?

A. 16 years—15 years and a half.

Q. It acquired the "Olympic", then, after you became president?

A. Yes, sir.

Q. How long have you been master of the "Olympic" since the acquisition by the Hermosa?

A. Most of the time.

Q. Now, Captain, referring to this blueprint—I forget the exhibit number.

Mr. Cluff: 3, I think.

Q. By Mr. Adams: Will you tell us if there are any bulkheads—if there were any bulkheads in the "Olympic" lower hold?

Mr. Cluff: Just a minute. To which we object upon the ground it is not proper examination.

A. There is a bulkhead here.

The Court: I think it is proper. You introduced these plans and he said that they covered that vessel. I think he can go into any details of construction.

Mr. Cluff: Very well.

A. There is a bulkhead here.

Mr. Adams: Let the record show the witness is

(Testimony of Joakim Martin Anderson.)

indicating a perpendicular line which is nearest to the bow of the stem of the "Olympic".

Q. How far abaft of the stem of the "Olympic" is that [22] bulkhead?

A. Approximately 20 feet.

Q. Is there any other bulkhead from that one 20 feet abaft the stem, clear to the stern of the ship?

A. There is an iron one, but it is not watertight.

Q. And where was that wooden bulkhead located? A. Right here.

Q. Does that extend from the keel of the ship clear to the top of the under deck?

A. No, sir; that is just in the tween deck. The lower hold was full of sand.

Q. Then, there is no other watertight bulkhead from the forward bulkhead, 20 feet abaft the stem, clear to the stern of the ship? A. No, sir.

Q. And there was none at the time of the collision? A. No, sir.

Q. Now, you spoke about sand. Where was this sand located, Captain?

Mr. Montgomery: I think, your Honor, that there should be an objection to any testimony of this character with respect to bulkheads, and this, that and the other thing, as not having any materiality with respect to the interveners.

Mr. Adams: If the court please, it does have materiality with respect to the interveners. [23]

The Court: I am going to admit it, subject to a motion to strike by interveners. They can mention

(Testimony of Joakim Martin Anderson.)

it and we will discuss that matter later, and I want to get the facts out here, gentlemen.

Mr. Adams: Will the reporter read the pending question?

(Question read by the reporter.)

Mr. Montgomery: May we have that same objection with respect to the sand?

The Court: Yes; the same objection and same ruling.

Mr. Adams: Will you answer that question, Captain? Where was the sand?

A. No. 1 hatch and the main hatch, and then she was leveled off underneath the tween decks; and then we had a few cement blocks on top of the sand there to keep it solid.

Q. In this open hold you had 1,500 tons of ballast, did you not?

A. Yes, sir; approximately that much.

Q. And that ballast consisted of this sand and gravel spread clear from this bulkhead, or did it go forward of the bulkhead?

A. No; it didn't. No; it didn't go any further than the foremast, just in here, had nothing here.

Q. In other words, from the foremast clear to the stern?

A. Not all the way down; to about here.

Mr. Adams: And the witness was indicating a point somewhere between the—— [24]

Mr. Cluff: The after end of the tank, the water ballast tank.

Q. By Mr. Adams: Oh, right here. Is that

(Testimony of Joakim Martin Anderson.)

correct, Captain, the after end of the water ballast tank? A. Yes, sir.

Q. Now, you spoke of cement blocks. You had some cement blocks in addition to the sand and gravel, did you not?

A. Just a few on top to keep the sand down.

Q. About how many did you have?

A. Oh, about a half a dozen, I presume.

Q. They weighed about how much? About a ton each, was it?

A. Well, somewheres along there.

Q. By the Court: Is that in addition to the 1,500 tons?

A. Yes, your Honor. That was just a few blocks on top.

Q. I know, but you had about 1,500 tons of sand, and then in addition to that you had these blocks of concrete or cement? A. Yes, sir, your Honor.

Q. By Mr. Adams: How much did you say all those blocks of concrete weighed?

A. Well, they were various sizes, you know. They were running from——

Q. What is your estimate of the total weight of these concrete blocks? [25]

A. Oh, it wouldn't be more than 10 tons for the lot, and that would be high.

Q. Now, Captain, will you give us the height above the surface of the main deck of the various masts of the "Olympic" as they stood at the time of the collision?

A. You mean from the deck up to the mast?

(Testimony of Joakim Martin Anderson.)

Q. Yes.

A. About 60 feet.

Q. That is the forward mast?

The Court: 60? A. Yes, sir.

Q. By Mr. Adams: The forward mast?

A. They were all about in the same line.

Q. They were all about in the same line?

A. They were all cut off at the cap backstays.

Q. On this blueprint which we are looking at, "Olympic" 3, I believe——

A. "II".

Mr. Adams: It is the "Olympic" 3.

Mr. Cluff: No; only two of them.

Mr. Adams: There are two figures.

Mr. Cluff: Oh, the exhibit, yes, is 3, the Exhibit 3. I thought you meant the "Olympic II", the "Olympic" second.

Mr. Adams: Oh, no.

Q. What is the blue crayon—I take it that is what it is on this blueprint—what is that supposed to indicate [26] there?

A. That is the water line.

Q. It indicates the water line, that lower edge of that blue crayon?

A. Yes, sir; this is the water line here.

Mr. Cluff: You indicated the lower edge of the top section? A. Yes, sir.

Q. By Mr. Adams: Did you have any propulsion machinery in the "Olympic" at the time of the collision? A. Propelling machinery?

Q. Yes. A. No, sir.

(Testimony of Joakim Martin Anderson.)

Q. By the Court: Have you ever had?

A. No, your Honor; never had. She was a sailing ship.

Q. By Mr. Adams: And you said she was built in 1877?

A. In Belfast, Ireland, of iron.

Q. Of iron? A. It was a good ship.

Mr. Adams: Well, I move that portion be stricken.

The Court: Oh, I don't think so. I think a man has a right to say that he has got a good ship.

Q. By Mr. Adams: Did I understand you to say she was a good ship, is that it?

A. She is. She was the best ship on the coast, barring none. She would outlast any ship that they build, even [27] nowadays.

Mr. Adams: I think that portion, at least, ought to be stricken, if the court please.

Mr. Cluff: You asked for it.

The Court: Well, gentlemen, that does not establish liability or non-liability one way or the other.

Mr. Adams: I realize that every master is entitled to think his ship is a good one.

The Court: Just the same as you lawyers are each entitled to think you have got a good case.

Q. By Mr. Adams: What was the capacity of that water ballast tank, Captain?

A. The fresh water tank you are referring to, I presume?

Q. Well, that was the water ballast tank that

(Testimony of Joakim Martin Anderson.)

we referred to when we were trying to measure the distance that the ballast extended aft, do you remember that, from the blueprint?

Mr. Cluff: Just show him that blueprint.

A. There were two 30,000 gallons. Is that what you are trying to——

Q. By Mr. Adams: I am referring to this tank here. A. Yes.

Q. Shown in the lower drawing on this blueprint? A. Yes.

Q. 97 tons, is that the capacity?

A. That is what he figured out. They are two 30,000- [28] gallon tanks, I think, or maybe a little less. I never did measure that and we never fooled with them.

Q. One on each side of the ship?

A. Yes, sir.

Q. Did you keep water in them?

A. Yes; we had standby water there.

Q. Was the water in them at the time of the collision?

A. Yes, sir; there was some in there, not——

Q. Fresh water?

A. Fresh water, yes. We never used that for no water ballast.

Q. Do you know how much water you had in those tanks at that time?

A. The only recollection I got about the tank is that the man that measured them, he says, you got that much capacity in the tanks. This man here that drew this chart, your Honor.

(Testimony of Joakim Martin Anderson.)

Q. Do you take soundings on this tank from time to time to ascertain the water in the tanks?

A. No; we never bothered with them. We leave them there and I go down once in awhile and check up on it. Oh, occasionally we would run a sounding rod down there to find out if everything was all right.

Q. At the time of the collision how much fresh water do you think was in those two tanks?

A. Oh, I should judge it should be about three-quarters [29] full.

Q. And that would be approximately how many gallons or how many tons? Can you give us the measure of it?

A. No; I couldn't figure that.

Q. Does each tank hold 97 tons?

A. No. That is the total amount, I presume.

Q. Of the two tanks? A. Yes, sir.

Q. Well, do you know for certain?

A. No, sir; I don't. But two—I think the tanks, your Honor, were 30,000 gallons apiece; but he says they wasn't that big, but that is what the packers told me at the time we bought the ship.

Q. Are there any other details about this blueprint that you do not agree with? A. No.

Mr. Cluff: I object to the question. I don't think he has said he didn't agree with it.

Mr. Adams: He said that this man told him this——

The Court: I know, but he says he did not measure it. He says he never measured it, but he understood it was a 30,000-gallon capacity.

(Testimony of Joakim Martin Anderson.)

Q. By Mr. Adams: Which do you think is correct, your understanding of it or what this——

The Court: Maybe there isn't any difference.

Mr. Adams: Well, this shows, if the court please, two [30] 11,520-gallon water ballast tanks, 97 tons.

Q. Do you think that that is the approximate capacity of those tanks?

A. Well, I paid that man to go out and measure those for United States local inspectors; and I have never measured the tanks, myself, Mr. Adams.

Q. All right. You think they were about three-quarters full?

A. Something like that.

Mr. Adams: Now, we had, I believe, if the court please, a certificate introduced before Commissioner Head in a hearing in the limitation proceedings in this case which has already been introduced.

Mr. Cluff: The limitation proceedings are right there on the clerk's desk. There is an envelope in there containing the exhibits.

Mr. Adams: I have in my hand what purports to be a copy of the Consolidated Certificate of Enrollment License of the "Olympic", which was issued at San Francisco on April the 11th, 1934. May it be stipulated, Mr. Cluff, that this is the copy of the certificate issued by the Custom-house?

Mr. Cluff: Yes. I have stipulated that with you already.

Mr. Adams: I offer this in evidence.

The Clerk: How do you want your exhibits marked? [31]

Mr. Adams: "Sakito" A.

(Testimony of Joakim Martin Anderson.)

SAKITO EXHIBIT A

THE UNITED STATES OF AMERICA

Department of Commerce

Bureau of Navigation

Cat. No. 1342—1917

BILL OF SALE OF ENROLLED VESSEL

(Secs. 4170, 4171, 4192, 4193, 4194, 4196, and 4312,
Revised Statutes, and Arts. 57 and 61, Customs
Regulations of 1923.)

To all to whom these Presents shall come, Greeting:

Know Ye, That * * * * *

of the.....or vessel called the.....
of the burden of.....tons, or thereabouts,
for and in consideration of the sum of.....
dollars, lawful money of the United States of
America, to.....in hand paid, before the seal-
ing and delivery of these presents, by† * *
the receipt whereof.....do hereby acknowledge
and.....therewith fully satisfied, contented, and
paid, have bargained and sold, and by these presents
do bargain and sell, unto the said† * * *

*Here insert the name and address of each vendor, and the part conveyed by him.

†Here insert the name and address of each vendee, and the part conveyed to him.

(Testimony of Joakim Martin Anderson.)

Sakito Exhibit A—(Continued)

heirs, executors, administrators, and assigns,
of the said or vessel, together with
the masts, bowsprit, sails, boats, anchors, cables,
tackle, furniture, and all other necessities there-
unto appertaining and belonging; the latest Con-
solidated Certificate of Enrollment and License of
which said or vessel is as follows, viz:

A True Copy of the Latest Consolidated Certificate
of Enrollment and License

THE UNITED STATES OF AMERICA

Department of Commerce

Bureau of Navigation

Permanent or temporary—Permanent Certificate
No. 239

Official No. 116975. Letters K. N. Y. W.

Measured:, 1..; Rebuilt at, 1..;
Remeasured:, 1..

Service: O. Passenger; Number of Crew, 7.

Consolidated Certificate of Enrollment and License

(Sections 4319 and 4321, Rev. Stats., and
Act of April 24, 1906)

In Conformity to Title L, "Regulation of Vessels
in Domestic Commerce," of the Revised Statutes of
the United States, S. Laz. Lansbrugh of S. F., State
of Cal., Vice President, having taken and sub-
scribed the oath required by law, and hav-

(Testimony of Joakim Martin Anderson.)

Sakito Exhibit A—(Continued)

ing sworn that Hermosa Amusement Corporation, a corporation organized and existing under the laws of the State of Calif., and having its principal place of business at San Francisco (Mills Bldg.) State aforesaid is a

This document surrendered at S. F., Oct. 3, 1940 on account of Vessel sunk—Total Loss. Collided with Jap. M/S, Sakito Maru Sept. 4, 1940, 31½ miles off San Pedro light house—7 lives lost and 1 in dispute.

citizen of the United States and the sole owner of the vessel called the Olympic II, of San Francisco and that the said vessel was built in the year 1877, at Belfast, Ire., of Iron as appears by P. R. No. 115 issued at this port Feb. 23, 1933, Now surrendered, Property changed, Service changed from O. Fishing, Rig changed from ships, name changed from Star of France, authority B/N Telegram dated Mar. 29, 1934, Trade changed, and said Register and Paul Hilman, Notary Public, County of Marin, State California, having certified that the said vessel is a Ship, now a barge; that she has two decks, three masts, a figure head, and a round stern; that her register length is 258 feet, her register breadth 38 feet, her register depth 22.8 feet, her height feet; that she measures as follows:

(Testimony of Joakim Martin Anderson.)

Sakito Exhibit A—(Continued)

	Tons	100ths
Capacity under tonnage deck.....	1487	22
Capacity between decks above tonnage deck..		
Capacity of inclosures on the upper deck, viz:		
Forecastle....; bridge....; poop....; break....;		
houses—round...., side...., chart...., radio....;		
excess hatchways....; light and air....; 279		50
Gross Tonnage	1766	72
Deductions under Section 4153, Revised		
Statutes, as amended:		
Crew space.....	156.80	
Masters cabin	35.14	191.94
Anchor gear	14.45	
Boatswain stores	10.63	25.06
Donkey engine and boiler.....	21.34	21.34
Propelling power (actual space,		
.....),	13.90	252 24
Net Tonnage	1514	

The following-described spaces, and no others, have been omitted, viz: Forepeak...., aftpeak...., open forecastle...., open bridge...., open poop...., open shelter-deck...., anchor gear...., steering gear...., donkey engine and boiler...., other machinery spaces...., light and air space over propelling machinery...., companions...., skylights...., wheelhouse...., galley...., condenser...., water-closets...., cabins....

and the said.....having agreed to the description and measurement above specified, the said vessel has been duly Enrolled at this Port;

License

And J. H. Madden, the master, having sworn that he is a citizen of the United States, that this license shall not be used for any other vessel, or for any other employment than is herein specified, or in any trade or business whereby the revenue of the United States may be defrauded:

License is hereby granted for the said vessel to

(Testimony of Joakim Martin Anderson.)

Sakito Exhibit A—(Continued)

be employed in carrying on the Coasting Trade
for One Year from the date hereof, and no
 longer.

Given under my hand and seal, at the Port of
 S.F.-Oakland, in the District of San Francisco, this
 11th day of April, in the year one thousand nine
 hundred and Thirty-four (1934).

11—1416

.....
 Comptroller of Customs.

A. H. CLIFFORD,

Deputy Collector of Customs.

[Endorsed]: Filed Sep. 16, 1941.

Mr. Cluff: Mr. Wire, you might make a mem-
 orandum there that three exhibits out of this limi-
 tation file have been withdrawn and put in evi-
 dence in this case.

The Court: Proceed, gentlemen.

Mr. Adams: I am just waiting for the exhibit
 to be marked.

Q. Referring to "Sakito" A Exhibit, and par-
 ticularly to the portion of the exhibit that contains
 a description of the "Olympic II", will you read
 that, Captain, and tell us if the dimensions shown
 on there are substantially correct?

Mr. Cluff: Which dimensions are you referring
 to?

(Testimony of Joakim Martin Anderson.)

Mr. Adams: I am referring to all of the dimensions of the "Olympic".

A. No. This is not according to the book.

Q. Which are you speaking of as not in accordance with the book?

A. The gross tonnage is correct, the length is—the net tonnage 1,544, but this must be the over-all length of 270.

Mr. Cluff: That is not length, that is the tonnage.

A. No; I mean above that. 279——

Mr. Cluff: That is the over-all length.

A. That must be the over-all length.

Q. By Mr. Adams: That is your over-all, then, 279.50, is that correct? [32] A. Yes.

Q. Then, these dimensions as shown here are correct?

A. Well, I haven't got all those figures in my head; but the net tonnage is correct, the gross tonnage is correct, and 279 feet must be the length over all, which I never did really measure.

Q. Is the figure shown for capacity under "Tonnage-deck" correct?

A. No. I have never measured that.

Q. Are these figures shown with respect to the deductions correct?

A. No; I have never measured that out.

Q. Well, so far as you know they are not incorrect?

A. So far as I know they are not incorrect, as far as I know.

(Testimony of Joakim Martin Anderson.)

Q. What other fog-signaling devices, if any, did you have aboard the "Olympic" at the time of the collision in addition to the bell that you speak of?

A. What other fog signals?

Q. Fog-signaling devices did you have aboard the "Olympic" other than the bell that you spoke of?

A. We had a fog horn but we never used that when we were at anchor.

Q. How was that manipulated?

A. That is a mechanical fog horn that we——

Q. What is the power that causes it to sound?

[33]

A. Well, there is—you just pump it, you know, back and forth with a lever and the sound comes out of the horn.

Q. Was that in working order?

A. Oh, yes.

Q. You never used it, though?

A. No. We have no occasion to use it while we are laying at anchor.

Q. Where is it located there?

A. Aft in the pilot house.

Q. Your fog horn has never been used after May the 9th, then?

A. No occasions to use the fog horn.

Q. On what occasions would you use the fog horn?

Mr. Cluff: "No occasion to use the fog horn," he said.

A. No occasion to use the fog horn.

(Testimony of Joakim Martin Anderson.)

Mr. Adams: Oh, I beg your pardon.

Q. What was the make of this bell that you had aboard the "Olympic"?

A. The bell metal?

Q. No. I mean the manufacture. Do you know the trade name of the bell?

A. No; I don't. I don't know.

Q. Was there any particular type of bell that this bell fits into? Can you give us a description of the type of bell other than what you have?

A. Just an ordinary ship's bell. [34]

Q. What lifeboats, if any, were there aboard the "Olympic"?

A. We had one 22-foot lifeboat.

Q. What was the capacity of that lifeboat?

A. 20 people.

Q. And where was that located?

A. On top of the after house.

Q. Did you have davits in which the lifeboat hung so that the lifeboat could be launched by means of the davits?

A. No. We had the boom and that was approved by United States local inspector.

Mr. Adams: I move that the latter part be stricken as a conclusion.

The Court: That may be stricken. Just describe what you had.

A. We had a boom, your Honor, a 36-foot boom. We had a double tackle attached to the boat and the line to a double-action winch to launch the lifeboat.

(Testimony of Joakim Martin Anderson.)

Q. By Mr. Adams: What power did you use to run the winch? A. Hand power.

Q. Hand power. How many men did it take to operate the winch? A. One.

Q. How many men did it take to operate or launch the lifeboat? [35]

A. Two men launched it. We generally have three.

Q. How long did it take to launch that lifeboat, launch it as it was, with, let us say, three men?

A. About three or four minutes.

Q. As a matter of fact, it took at least five minutes, didn't it, Captain?

A. Oh, we could launch it in four minutes. We only have to raise it about 14 inches up with the block and swung it out. That is all the distance you had to rise her.

Q. That lifeboat had never been lowered into the water after you anchored the "Olympic" out there on May 9th, had it?

A. Not only that, but let me explain, it was always out in the spring and I had it overhauled.

Q. You had it overhauled before you went out to anchor on May 9th; but it had not been launched or lowered by means of this boom since you were anchored on May 9th, had it?

A. No; not that boat.

Q. You had had no boat drill since the "Olympic" anchored out there on May 9th, had you?

A. No.

(Testimony of Joakim Martin Anderson.)

Q. That lifeboat carried 20 persons, is that correct?

A. Approximate 20. I don't remember.

Q. How many persons were there aboard the "Olympic" at the time of the collision? [36]

Mr. Cluff: If you know.

A. I don't know.

Q. By Mr. Adams: Did you ever take any bearings with respect to the position of the "Olympic" after she anchored at Horseshoe Kelp on May 9th?

A. I did. I took a bearing of the lighthouse on the breakwater.

Q. 1 point bearing?

A. 1 point bearing, that is all.

Q. When was that taken?

A. Oh, just after we got there and anchored. That is the first thing I did, to get the course in. The "Point Loma" was not in that particular place at the time so I got a good bearing on that.

Q. You never took any cross bearings, then, after you anchored there on May 9th?

A. No.

Q. Is that correct? Your estimate of the location of the barge is based solely upon this 1 point bearing that you took, is that it?

A. 1 point bearing and the depth of the water.

Q. How did you ascertain the depth of water?

A. By measuring with a deep sea lead.

Q. How many times did you do that?

(Testimony of Joakim Martin Anderson.)

A. About three times.

Q. And those are the two factors that you considered in [37] locating the position of the barge?

A. Yes, sir.

Q. Now, what was the direction of the axis of the "Olympic" or her heading as she lay anchored there to Horseshoe Kelp after May 9th? Can you give that to us in true degrees?

A. I don't know what you—what you say?

Q. I am trying to ascertain the direction of the heading of the "Olympic" as she lay at anchor after May 9th.

A. She was heading west, approximately, all the time.

Q. Was that due west? A. Yes, sir.

Q. What is your estimate based upon of the distance between the "Olympic" and the "Point Loma"?

A. By sea experience.

Q. Well, what sea experience led you to estimate that distance between the "Point Loma" and the "Olympic"?

A. Well, I have been anchoring ships for about 14 years, and I after that—

The Court: Gentlemen, I think this argument between the third or sixth of a mile that you have here, three and one-half and three and one-third, I am not going to listen to a lot of estimates on that when you have actual measurements that you can go by. I think it is unfair to take up the time of the

(Testimony of Joakim Martin Anderson.)

court with this argument between you as to one hundred or two hundred yards, one way or the other, as to the [38] location of it.

Mr. Adams: I might state—the court, of course, can't anticipate what the evidence is—but the distance away of the barge is somewhat important because the testimony will show that the bell was rung, depending upon whether the other barges could be sighted or not; in other words, the distance of the barges from the "Olympic" somewhat was the guage used to go by.

The Court: That may be all right, the distance between the boats there. But whether this is 3.3 from Point Loma or three and one-half miles, why argue about it?

Mr. Adams: Oh, no; I am not arguing about that. I am trying to ascertain how he estimated the distance between the "Olympic" and the "Point Loma", the two barges.

The Court: Oh, that is what you mean.

Mr. Adams: Yes.

The Court: All right.

Q. By Mr. Adams: Now, can you tell us how you arrived at this estimate of the distance that you give between the "Olympic" and the barge "Point Loma"?

A. While we were at anchor at Redondo we had about three or four, or sometimes five, barges in there and we were anchored in rows; and that is how I knew my distance when I got in there,

(Testimony of Joakim Martin Anderson.)

approximate distance of about 1,500 feet from the "Point Loma", I should judge we were.

Q. Well, it was just an estimate that you made by that [39] observation and your sight, isn't that correct? A. Yes, sir.

Q. And the same is true——

Q. By the Court: In other words, your judgment? A. Yes, your Honor.

Q. By Mr. Adams: And the same is true of the distance between the "Olympic" and the barge "Rainbow", as estimated by you, is that correct?

A. It is.

Q. How much chain did you say you had out on your bow mooring?

A. Seven shots, 630 feet to the hawse-pipe.

Q. Did you have a buoy there in addition to the anchor?

A. On the stern anchor.

Q. Only? A. Only.

Q. What was the chain you had out on the stern anchor?

A. One and one-quarter-inch.

Q. What was the length of it?

A. 300 feet.

Q. Does that cover the length of the chain from the stern of the "Olympic" clear down to the weight at the bottom, or does that only run from the stern of the "Olympic" to the mooring buoy?

A. The chain is made fast to the anchor and then the buoy is made fast to the crown of the

(Testimony of Joakim Martin Anderson.)

anchor, so in case of [40] the ship swings around in any water, we take up the buoy and we swing the ship around heading west again to be against the swell.

Q. Thank you very kindly, Captain. In other words, you had a chain running direct from the stern of the "Olympic" to the anchor?

A. That is right.

Q. And then you had another chain running from the anchor to the buoy?

A. That is right.

Q. All right. Then your chain from the stern of the "Olympic" to the anchor was the distance or the length that you just gave, is that correct?

A. Yes, sir.

Q. That is the answer, thank you. Now, do you know whether any of these moorings were severed by the collision?

Mr. Cluff: If you know?

A. I don't know.

Q. By Mr. Adams: Did you receive any report from a diver concerning that feature?

The Court: I think that is hearsay, isn't it?

Mr. Adams: If the court please, I think, of course, if the diver is going to be here to report on it, why, maybe that would be the best evidence; but if a diver was sent down to make a report to the master of the ship, I think there is an exception to the hearsay rule in this case. [41]

Mr. Cluff: If you want a stipulation, I will stip-

(Testimony of Joakim Martin Anderson.)

ulate the chain to the stern anchor was broken, and the port anchors were intact. That is our information.

Mr. Adams: I am in the position of not having any information. That is why I am asking the question.

The Court: Go ahead and ask. It is easier to let you go than to argue.

Q. By Mr. Adams: Do you know whether the chains——

A. As I came out there at the time that the diver went down to look for something, and I saw the buoy was there, so I presumed that the stern chain had parted; but the bow chains, I was informed, was all right.

Q. That the bow chains——

A. The bow chains was O. K.

Q. Were you informed by the diver that the stern chain had been severed? A. Yes.

The Court: Now, I did not understand it that way. I understood he said it was intact. Which was it?

A. It was broke, your Honor.

The Court: All right.

A. That is the stern chain only.

The Court: Oh.

A. It was the bow chain that was intact.

Mr. Cluff: May I suggest a clarification there? There were two chains, Captain, one leading from the anchor to the [42] buoy and the other leading

(Testimony of Joakim Martin Anderson.)

from the anchor to the ship. The one leading from the anchor to the ship was broken and the one leading from the anchor to the buoy was intact?

A. That is right.

Mr. Cluff: That was the situation.

Q. By Mr. Adams: Now, you named the three crew members of the "Olympic". State whether or not any of those crew members had a certificate as to operation of a lifeboat; in other words, had a lifeboat certificate.

Mr. Montgomery: Objected to on behalf of the interveners. We have not interposed objections as we went along, but we object to any evidence with respect to these matters which might possibly show some contributory negligence on the part of the "Olympic" as not being attributable to the interveners.

The Court: Overruled. You may proceed.

Mr. Cluff: I am going to make an objection on the grounds it is not proper cross examination. It has no bearing.

The Court: Gentlemen, you are going to have to go into this sooner or later. Why not go into it and have it? We are going to get the cards out here. You are going to have to put the cards on the table before you get through.

Mr. Adams: That may be true. I am going to ask qualifications, that is all.

The Court: Go ahead.

Mr. Adams: Will you answer the question, please, Captain? [43]

(Testimony of Joakim Martin Anderson.)

A. The name of the crew?

Q. No. I will ask the Captain again. Did any of the three members of the crew that you named have a lifeboat certificate? A. I don't know.

Q. Well, the answer is that the knowledge that you have, they did not, isn't that correct?

The Court: He said he didn't know.

A. I didn't know.

Q. By Mr. Adams: You never inquired?

A. No; I never did.

Q. Now, do you know whether any of them held any license or certificate issued by the Bureau of Marine Inspection and Navigation?

A. Yes; Mr. Ohiser.

Q. And what did he have?

A. I don't know. I know he has got something.

Q. Did you ever inquire before you hired him?

A. No.

Q. Did you ever inquire before the collision as to what license he might hold?

A. No; I never did.

Q. You didn't know until after the collision. Greenwood you spoke of as being the shipkeeper.

The Court: The what?

Q. By Mr. Adams: Is that the title you gave to Greenwood? [44]

The Court: I didn't get that term. What did you say?

Mr. Adams: Shipkeeper.

(Testimony of Joakim Martin Anderson.)

A. That is the same as barge master. When I was away he was in charge out there.

Q. I see. Now, tell us what were the duties of these three crew members, beginning with Ohiser, please.

A. He was the night watchman.

Q. What were his duties?

A. His duties were to keep a good lookout at night time and ring the bell when it was foggy. Greenwood, he was looking after the engines, getting the pumps started in the morning; and the boy, he was taking care of the bait and giving service to the people on board the ship.

Q. Now, at the time of the collision did the "Olympic" have any certificate whatsoever?

Mr. Cluff: What do you mean by "a certificate"?

Mr. Adams: Well, a certificate issued by either the Custom-house or the Bureau of Marine Inspection and Navigation.

A. The inspection certificate you are referring to?

Q. Yes.

A. The inspection certificate we didn't have.

Q. That was picked up in 1938, wasn't it?

A. That is right. But let me explain about that.

The Court: Just answer the questions.

Mr. Adams: Just a minute. I just want that question [45] answered.

A. Yes, sir.

(Testimony of Joakim Martin Anderson.)

Q. That it was picked up in 1938?

A. Yes, sir.

Mr. Adams: Now, Mr. Cluff, I have asked you before this trial to produce the original of the specifications issued by the Bureau of Marine Inspection and Navigation.

Mr. Cluff: I did have it last night. I didn't expect that you would go into it today. Apparently I did not bring that file here this morning. I meant to but did not. I will have them here this afternoon. [46]

Mr. Adams: I also have a copy. Would you care to examine it? I think it is the same, only mimeographed.

Mr. Cluff: So far as I know, that is the same thing. Are you prepared to say it is the same as the one we got?

Mr. Adams: Yes; so far as I know it is.

Mr. Cluff: Well, do you know?

Mr. Adams: I haven't seen yours.

The Court: You can compare it afterwards, gentlemen, and if there are any corrections, why, you can make them.

Mr. Cluff: So far as I know, that is a copy of the letter and also the mimeographed sheets.

Mr. Adams: This is another copy that was mimeographed. I had some notations on that one.

Q. Captain Anderson, I show you a copy of a letter addressed to you under date of June 3, 1940, by the U. S. Local Inspectors, Edward Stuart and

(Testimony of Joakim Martin Anderson.)

Joseph A. Moody, to which is attached a mimeographed copy of specifications entitled "Inspection and Certification of Non-Self-Propelled Pleasure Vessels" and I ask you if you received that letter on or about the date shown?

A. I did.

Q. Did you also receive the specifications attached to that letter? A. I did.

Mr. Adams: I offer this in evidence, if the court please. [47]

Mr. Cluff: To which we object upon the ground it is irrelevant, incompetent and immaterial, absolutely no bearing on the issues involved in this collision.

The Court: Gentlemen, I am going to receive it subject to a motion to strike. I appreciate your point and I will be very much interested in having the points of law involved briefed, because that was one of the troubles we had when I was United States Attorney and I am still interested in finding out just what control the federal government has over those pleasure boats.

Mr. Adams: If the court please, we covered that to some extent in our pre-trial brief.

The Court: I appreciate that you did; but as far as the court is concerned, it is an open question and I am going to let all the facts in, gentlemen. I will be pretty liberal in admitting evidence.

Mr. Cluff: Subject to the objection. Then I won't repeat my objection. It is understood this objection runs to all this line of testimony.

(Testimony of Joakim Martin Anderson.)

Mr. Montgomery: May we have a special objection upon the part of the interveners, as not being binding upon them in any way whatsoever?

Mr. Black: In that connection, we wish it understood that so far as libelant Mrs. McGrath is concerned, we do not join in that objection. We think it is material.

Mr. Eastham: I make the objection there is no authority [48] at law for the regulations.

The Court: I told you gentlemen I was going to receive it subject to a motion to strike, and I will give you a chance to show me what the law is on the question. I never could find it out when I was United States Attorney. I never was able to come to any definite conclusion, and maybe you can help me now.

Mr. Montgomery: May we have the date of that letter?

The Clerk: That is Sakito Exhibit B.

Mr. Adams: June 3, 1940.

SAKITO EXHIBIT B

Copy

M-1270

June 3, 1940

312 Post Office & Customhouse
San Pedro, California.

Mr. J. M. Anderson

P. O. Box 437, Hermosa Beach, Calif.

My dear Sir:

You are informed that non-self-propelled vessels over one hundred gross tons anchored or moored

(Testimony of Joakim Martin Anderson.)

Sakito Exhibit B—(Continued)

on the seas or on waters connected therewith, that are not protected from the hazards of the sea, which are patronized by the public for pleasure purposes, are subject to inspection under the provisions of the act of Congress approved on May 28, 1908 and must be certificated as a condition to their operation in such service.

To facilitate the inspection and certification of vessel operated in such service, there is herewith enclosed application form 833, upon which to submit an application to this Board for the inspection and certification of your vessel. There is also submitted an outline of the general requirements which in the opinion of this Board must be complied with in order that non-self-propelled pleasure vessels may be suitable and safe for the purposes in which they are employed.

The operation of your vessel without a valid certificate of inspection on board constitutes a violation of the act of Congress approved on May 28, 1908 and if found operating in such service without inspection and certification, you will be duly reported for the violation of such act.

Yours very truly,
EDWARD STUART,
JOSEPH A. MOODY,
U. S. Local Inspectors.

Enclosure.

(Testimony of Joakim Martin Anderson.)

Sakito Exhibit B—(Continued)

INSPECTION AND CERTIFICATION OF NON - SELF - PROPELLED PLEASURE VESSELS.

Non-self-propelled vessels over 100 gross tons, anchored or moored on the seas or on waters connected therewith, that are not protected from the hazards of the sea, which are patronized by the public for pleasure purposes, are subject to and shall be inspected and certificated pursuant to the provisions of the act of Congress approved on May 28, 1908. (46 U.S.C. 395, 396, 397, 398.)

The following general provisions constituting minimum requirements shall be followed in the inspection and certification of such vessels:

Hull

1. The vessel shall be dry-docked for inspection.
2. The structure comprising the keel, stem, stern-frame, keelsons, stringers, frames, beams, decks, bulkheads, ceilings, sheathings, planking, plating, fastenings, etc., including also the frames, beams, plating or planking of superstructures, deck houses, etc., and all holds, bilges, peaks and tanks, shall be thoroughly inspected and necessary tests shall be made to determine actual conditions and suitable repairs, renewals or replacements effected where found necessary.

(Testimony of Joakim Martin Anderson.)

Sakito Exhibit B—(Continued)

3. All sea chests, suction, and all other openings in the hull, shall be opened, examined and placed in suitable condition.

4. A sufficient number of transverse watertight bulkheads shall be fitted so that the vessel will remain afloat with positive stability in the event any one main compartment is flooded.

5. The structural strength of the vessel shall be in all respects sufficient.

6. The rudder, pintles and gudgeons shall be examined and placed in good condition.

7. All spars, rigging and gear shall be placed in a safe condition, or removed if unnecessary.

8. All ventilators and hatches shall be provided with suitable covers.

9. Platforms, stagings and gallery runways rigged outside of the hull shall be of suitable construction and not less than three square feet of deck space shall be allowed for each person; and where enclosed, shall be provided with at least two means of escape.

10. Railings shall be fitted where necessary, which shall be of not less than forty-two inches in height and of rugged construction.

11. An inclining test shall be made by a representative of the Bureau.

12. The name of the vessel shall be on each bow and stern, which shall be not less than six inch letters.

(Testimony of Joakim Martin Anderson.)

Sakito Exhibit B—(Continued)

13. Draft marks shall be checked and cut in.

Hull Equipment

14. All gangways, accommodation ladders and stairways, shall have suitable manropes on each side. All side gangways and ladders shall be of rugged construction. All running gear such as tackles, hooks, shackles, bridles, etc., shall be of suitable dimensions and in good condition.

15. Not less than two bower anchors with suitable chains in good condition shall be on board.

16. Anchor weights and diameter of chains shall comply with the Rules of the A.B.S. for passenger vessels of like tonnage.

17. All anchor chains shall be ranged and shackle pins backed out for inspection.

18. Length of chains shall be five times the depth of water in which the vessel is anchored, but in no case less than provided in the A.B.S. Rules for passenger vessels.

19. Chain lockers shall be clean, adequately drained, and the anchor chains suitably secured.

20. The following signal lights and apparatus shall be on board and available for immediate use.

a. Two anchor lights visible at least two miles, together with one auxiliary set.

b. One set of side lights suitable screened visible at least two miles.

c. Not under command signals consisting of two red lights and two black balls or shapes.

(Testimony of Joakim Martin Anderson.)

Sakito Exhibit B—(Continued)

- d. An efficient fog bell.
- e. Twelve approved self-igniting red distress lights in metal container.
- f. One signal lamp.
- g. One mechanical fog horn.
- h. Basket or other efficient signal for the purpose of indicating the side of the fishing vessel approaching vessels may pass.

22. The following equipment in suitable condition and ready for use shall be on board:

- a. An adequate number of suitable towing hawsers.
- b. Suitable and efficient steering apparatus.
- c. One thirty-fathom lead line and fourteen pound lead.
- d. One efficient steering compass.
- e. Sounding pipes with striking plates fitted to non-accessible compartments.
- f. Adequate frames with glass for notices and certificates of this Bureau.
- g. Metal-lined paint and lamp locker fitted with a self-closing flame-tight door.

Accommodations

23. All working and enclosed spaces occupied by persons, shall be provided with at least two means of escape so that at least one will be available in case of emergency.

24. There shall be at least ten square feet of

(Testimony of Joakim Martin Anderson.)

Sakito Exhibit B—(Continued)

deck space available for each person allowed on board.

25. Sanitary toilets shall be provided for males and females in separate suitable enclosures with doors suitably marked. Not less than one toilet shall be provided for each eighteen persons allowed to be on board.

26. A log book shall be kept in which a daily record of the number of persons on board during the day shall be entered.

27. The crew's quarters shall comply with the Seamen's Act.

Machinery

28. All machinery on board, including boilers and unfired pressure vessels, if any, shall conform to Rules I and II of the General Rules and Regulations.

29. Propeller shafts shall be either disconnected from their coupling bolts or removed, and if removed the stern tubes shall be blanked off.

Fire Control and Equipment

30. Spaces containing operating boilers or machinery located below the main deck shall be provided with suitable bulkheads, and if wood, shall be sheathed with insulating material covered with not less than #18 gauge galvanized iron.

31. All woodwork around galley stove, fired pressure vessels, and operating machinery on deck, shall

(Testimony of Joakim Martin Anderson.)

Sakito Exhibit B—(Continued)

be protected with not less than #18 gauge galvanized iron and asbestos.

32. All bilges, holds, compartments, etc., shall be free of all rubbish, waste, oil, etc.

33. The following approved fire detecting and extinguishing installations and equipment shall be on board:

a. An Automatic fire detecting and alarm system which will indicate audibly and register visually at a central station the presence or indication of fire in enclosed spaces.

b. A manual fire alarm system with manually operatable fire alarm boxes located in stairways, enclosures, corridors, public rooms, etc., on vessels with persons on board other than the crew during the nighttime.

c. A general alarm system operated manually from a central station.

d. A sprinkling system covering all spaces below the main deck fitted with fusible link heads connected to fire line with valve (s) on deck and suitably marked.

e. At least two power fire pumps, each of sufficient capacity to provide two powerful streams of water to fire hose outlets. Outlets shall be so located that any part of the vessel can be reached by two streams of water from hoses not more than fifty feet in length. The hose shall not be less than one and one-half inches in diameter. All fire hoses and

(Testimony of Joakim Martin Anderson.)

Sakito Exhibit B—(Continued)

fire lines shall withstand one hundred pounds pressure.

f. Spaces containing operating internal combustion or other type engines including electrical motors, shall be adequately protected from fire, and such number of fixed or portable foam or CO² fire extinguishers shall be provided as may be necessary to insure full protection.

g. Properly screened flame arresters on all gasoline engines, and suitable filling pipes and vents, properly screened, on all tanks containing gasoline.

h. A suitable number of portable fire extinguishers so distributed as to be available in any part of the vessel in the event of fire.

i. An adequate number of suitable fire axes.

j. When persons other than crew are on board, an efficient supervised fire patrol shall be maintained at all times covering the entire vessel at not more than twenty minute intervals.

k. A suitable watchmen's clock system.

l. The structures of all non-self-propelled pleasure vessels, for which the first application for inspection as such is made on or after July 1, 1940, shall be of incombustible materials throughout.

Lifesaving Equipment

34. Approved lifeboats with suitable launching arrangements and approved life rafts or buoyant apparatus, shall be carried sufficient to provide ac-

(Testimony of Joakim Martin Anderson.)

Sakito Exhibit B—(Continued)

commodations for all persons on board. Fifty per cent of such accommodations may be in lifeboats, and fifty per cent may be in life rafts or buoyant apparatus.

35. All lifeboats shall have approved equipment as follows:

Boat Hooks—One boat hood of suitable length, but not less than eight feet long by one and one-half inches in diameter.

Bucket—One galvanized iron bucket with lanyard attached.

Life Line—One life line properly secured the entire length on each side, festooned in bights not longer than three feet with a seine float in each bight.

Life Preservers—Two life preservers in addition to the vessel's complement of life preservers.

Oars—One single banked complement of oars and one steering oar.

Painter—One painter of manila rope not less than two and three-fourths inches in circumference, and of a length not less than three times the distance between the boat deck and the light sea-going draft.

Plugs—Drain holes, fitted with automatic plugs, with two caps for each hole attached by chains.

Rowlocks—Full complement of rowlocks attached to lifeboat by separate chains with spares.

Lantern—One flash or one lantern (containing

(Testimony of Joakim Martin Anderson.)

Sakito Exhibit B—(Continued)

sufficient oil) to burn at least nine hours and ready for immediate use.

36. The following approved installations and equipment for the better security of life shall be on board.

One adult life preserver for every person allowed to be carried; also ten per cent additional for children. Life preservers shall all be stowed in accessible places and stowage suitably marked "Adults' life preservers" or, "Children's life preservers."

b. Suitable number of ring buoys and water lights, one of which on each side shall be provided with fifteen fathoms of fifteen thread manila line attached, all located so as to be readily available for immediate use.

c. A line-carrying gun and equipment auxiliary thereto.

d. Floodlights on both sides of the vessel on vessels with persons on board other than crew during the nighttime.

e. Not less than two power-driven bilge pumps with suitable manifold, and suction from each compartment.

f. Medicine chest.

g. An efficient and suitable ship-to-shore radio telephone is also recommended.

Manning

37. A sufficient complement of licensed officers

(Testimony of Joakim Martin Anderson.)

Sakito Exhibit B—(Continued)

and certificated seamen, including lifeboatmen, shall be carried as may be required to adequately deal with any emergency that may arise; and a licensed deck officer shall be in command of the vessel.

38. Minimum crew while vessel is at anchor with persons other than crew on board:

1 licensed master.

1 licensed engineer.

Sufficient certificated lifeboatmen to adequately launch and man all lifesaving equipment, 65% of which shall be able seamen.

39. Minimum crew while vessel is underway with no persons on board other than crew:

Same as required on other seagoing barges of like tonnage.

General

40. A special survey as provided by Rule IV, Section 14, Ocean and Coastwise Regulations, shall be made.

41. The Local Inspectors shall determine and make such other requirements as in their judgment may be necessary for the safe operation of the vessel.

42. These vessels shall be inspected and certificated under the general provisions of Rules VI and VII of the General Rules and Regulations.

[Endorsed]: Filed Sep. 16, 1941.

(Testimony of Joakim Martin Anderson.)

Q. Referring to Sakito Exhibit B, Captain, and particularly to the mimeographed list of specifications attached thereto——

The Court: As a matter of fact, gentlemen, I think there is a case pending in one of the courts now in trying to establish the law on this very point.

The Witness: Yes, your Honor. That is the old "Okalalla". That has been in for three years.

Mr. Adams: It is my understanding, too, if the court please.

The Court: So I can understand why there is confusion in everybody's mind, including the court's.

Q. By Mr. Adams: I would like to have you refer to the first mimeographed page of that list of specifications if you will, Captain, under the title "Hull", No. 1: "The vessel shall be dry-docked for inspection." Did you ever [49] dry-dock the "Olympic" after the receipt of this letter?

A. No; I didn't; but I had permission not to dry-dock from the supervising inspector.

Mr. Adams: Just a minute. I move that latter portion be stricken, if the court please, as non-responsive and a conclusion of the witness.

Mr. Cluff: I submit the answer should stand.

The Court: You are asking for communications, and if there are any other communications from the department that did not require him to do it, I

(Testimony of Joakim Martin Anderson.)

think it is not any more than fair it be brought out.

Mr. Adams: All right. If there is such a communication, I ask it be produced.

The Court: It may not be in writing. It may be from the inspector in charge.

The Witness: Yes, your Honor; that was the case. We went to San Francisco and saw the supervising inspector, Captain Fisher, and we took it up before him that we had been in dry-dock a few years prior; and he knew the condition of the ship, and being an iron ship we wouldn't have to go to dry-dock.

Q. By Mr. Adams: Did he at that time allow you any other exemptions from this specification and this group of specifications?

Mr. Cluff: That calls for a conclusion of the witness. Let him testify to what was said and done. [50]

A. Well, yes. He also approved my life-saving equipment which he thought was as good as davits, and maybe better. We also told him that under this new regulation, your Honor, we could not operate, as it would cost up to \$50,000, and we were willing to quit right now our business. And Captain Fisher stated, "Well, I don't want to put everybody out of work, so we may be able to work something out when I come to San Pedro." Which he came down at the time of the accident, which they should modify this letter that they had sent to us, as it was impossible for a fishing barge to go under such rules

(Testimony of Joakim Martin Anderson.)

and regulations as the coastwise passenger steamers called for. In other words, we had to have six——

Q. By Mr. Adams: Just a minute. How much of this is what Captain Fisher told you and how much of this is your argument? When did your argument commence in this long line of statement?

I don't know, if the court please.

The Court: Well, gentlemen, is there any dispute of the fact that the department did not enforce these regulations, and gave them all a time to comply with them?

Mr. Adams: Yes; there is a very definite dispute. Captain Fisher informs us that these regulations were in force at the time of the collision, that there was no exemption given. And I would like at this time, in view of the statement of this witness, and the court allowing [51] the evidence to go in, to ask that the deposition of Captain Fisher be taken. I happen to know that Captain Fisher is attending an A Board hearing in Seattle, I believe on Thursday of this week, and it will probably be impossible for him to come down here. I ask now, in view of this testimony in the record, for leave to take his deposition to refute the testimony of this witness just given.

Mr. Cluff: Mr. Adams, would you care to stipulate that the letter that accompanied the report of the A Board was written by Director Roper?——

Mr. Adams: Absolutely not. It has no bearing on this situation, if the court please. It simply ex-

(Testimony of Joakim Martin Anderson.)

pressed that there was a doubt. We know there was a doubt. We will satisfy the court, I am sure, before we are through that we——

Mr. Cluff: I tender you the stipulation that that letter was written by Director Roper.

The Court: Gentlemen, let us not argue the case now. Let us proceed and find out. This may or may not be material, anyhow.

Mr. Adams: Yes.

Q. Let us refer, Captain, now to item No. 2 on that mimeographed list. Were all these items inspected and tested, as set forth in that list? I think you can answer that yes or no, can't you, Captain? [52]

A. No, they were not tested.

Q. With reference to item 4, which is "A sufficient number of transverse water-tight bulkheads shall be fitted so that the vessel will remain afloat with positive stability in the event any one main compartment is flooded." Were any such bulkheads put into the "Olympic", after the receipt of this letter? A. No.

Q. Referring to item 9, "Platforms, stagings and gallery runways rigged outside of the hull shall be of suitable construction." Did it comply with the specifications set forth in that item?

A. Yes, they appeared to be there.

Q. Did those enclosures provide two means of escape?

A. Yes, forward and aft, you could get out of the hold.

(Testimony of Joakim Martin Anderson.)

Q. I am talking about the staging.

A. What staging are you referring to, Mr. Adams?

Q. Stagings on the outside of the hull of the "Olympic"; that is what item No. 9 referred to. Will you read item No. 9, so that you won't be confused, Captain, please?

The Court: I think, Mr. Adams, you are going into a lot of matters here, which I think are quite far astray on the question of cross examination.

Mr. Adams: If the court please, maybe this is a bit [53] outside of the scope, but we are entitled, under the new Supreme Court admiralty rules, to examine the witness in the same manner as in the state court practice, under Section 2055. I would just as soon call him later, but I thought I would get the story now.

Mr. Cluff: We have a number of witnesses here, taken from their work and I would like to get them on.

Mr. Adams: I am right in the middle of this.

The Court: Gentlemen, if there are witnesses here, we should accommodate them, but if one side is going to be hardboiled, the court will be hardboiled about it.

Mr. Adams: If the court thinks that I am going to be hardboiled——

The Court: I think you are going into a lengthy matter, and if there are a number of short witnesses, they should be called.

(Testimony of Joakim Martin Anderson.)

Mr. Cluff: Captain Anderson will be available all the time. He lives here.

Mr. Adams: I ask that he be kept under subpoena.

The Court: He will be ordered to be here all the time.

Mr. Adams: I haven't covered all the items on my cross examination.

The Court: I am not going to shut you off. Proceed; but I am just telling you there is a limit to cross examination, particularly where you have a court room full of witnesses who have been taken away from their work. I [54] don't want to shut you off on anything you consider material.

Mr. Adams: I have about three other items.

The Court: Proceed.

Q. By Mr. Adams: Now, do I understand, Captain Anderson, that you did not operate the concessions on board the "Olympic"?

A. No, sir.

Q. They were operated by Mr. Joseph Karsh?

A. Yes.

Q. Do you know how many people there were in his staff, besides himself?

A. We had him, and a waitress, and then he had his two girls helping him out Saturdays and Sundays.

Q. You operated two shore boats to and from the "Olympic", did you not? A. I did.

(Testimony of Joakim Martin Anderson.)

Q. Their names were "Lillian L" and "Grant"?

A. That is right.

Q. Captain Anderson, at the time you anchored the barge "Olympic" at the Horseshoe Kelp on May 9th, you were acquainted with the steamer lanes of vessels entering Los Angeles Harbor from southern ports, and vessels leaving Los Angeles bound for southern ports, were you not?

A. What steamer lanes are you referring to?

Q. I am talking about the regular course of vessels [55] on leaving Los Angeles Harbor, going southbound, to other ports and San Diego—I say, were you familiar with the various courses?

A. No.

Q. Were you familiar with courses coming up from the Canal Zone, entering Los Angeles Harbor?

A. No, sir.

Q. How long have you been a master?

A. 20 years.

Q. Have you ever made that run between Los Angeles Harbor and the Canal?

A. No, I had been on the Australia Line all my life.

Q. You never made that run? A. No.

Q. After you anchored the barge "Olympic" on May 9th, did you ever observe vessels entering and leaving Los Angeles Harbor in the proximity of the "Olympic"? A. I have.

Q. Will you tell us how close those vessels passed by the "Olympic"?

(Testimony of Joakim Martin Anderson.)

A. They passed east of the "Rainbow" barge; all I saw.

Q. You never saw any vessels pass between the "Rainbow" and the "Olympic"? A. No, sir.

Q. You never did? You are sure of that?

A. Yes. [56]

Q. You never saw any vessels pass to the westward of the "Olympic"? A. Yes.

Q. You did? A. Yes.

Q. Rather frequently?

A. No; once in a while.

Q. You saw them pass in both directions, did you, that is, entering and leaving Los Angeles Harbor to the westward of the "Olympic"?

A. No; I told you once in a while. I cannot recollect, but I know there are a lot of ships out there, and they come and go, both pleasure, steam and sail.

Q. Let us confine the question to merchant vessels. What about the merchant vessels, did you see many merchant vessels pass the "Olympic" to the westward, entering and leaving Los Angeles Harbor?

A. No, they were all to the eastward.

Q. Did you ever see any merchant vessels pass the "Olympic" to the westward?

A. I can't recollect right now.

Q. What hours did you stay aboard the "Olympic", as a regular routine matter? Were you there all the time?

(Testimony of Joakim Martin Anderson.)

A. No, I went out during the day, and came back; checked up the cash, and saw that it was put in the bank, and so forth. [57]

Q. How often did you go out, daily?

A. Practically every day.

Q. What time did you usually go out?

A. Any time I felt like going out; sometimes I had other things to look after and couldn't go out. As a general rule, I went out in the morning; sometimes in the afternoon.

Q. About how long would you remain aboard the "Olympic", after you got out there, that is, at various times?

A. Sometimes the whole day, and sometimes just a short time.

Q. Did you, as a custom, spend nights aboard the "Olympic"?

A. When we were moving ship, I was on board all the time.

Q. Confining your answers to after the "Olympic" was moored out there.

A. Not in the night time. I went home to my wife.

Q. You never spent a night out there?

A. Yes, I did spend some nights out there.

Q. Just a few? A. Just a few.

Q. At the time you anchored the "Olympic" out there, you knew that that particular area was sometimes visited by fog, did you not? [58]

A. Yes, sir.

(Testimony of Joakim Martin Anderson.)

Q. In other words, you had observed fog in that area prior to that time, had you not?

A. Not very often; about, oh, maybe four or five times. That was all the fog we had all summer out there.

Q. I am talking now about what you had observed prior to the time you had anchored the "Olympic" out there; in other words, you had, prior to May 9, observed fog in the area in which you anchored the "Olympic"?

A. No.

Q. You never observed it?

A. No, I was only over a couple of times, and the wind and weather was fine whenever I went over there.

Q. Have you ever navigated between Los Angeles Harbor and Santa Catalina Island?

A. No.

Q. You have never been out between them——

Mr. Cluff: Mr. Adams, I will stipulate that it is very frequently foggy around Los Angeles Harbor.

Mr. Adams: I will accept the stipulation.

Q. After the "Olympic" was anchored out there, on May 9th, what currents did you observe, if any?

A. We had a northerly set, and a southerly set.

Q. Any particular time of the day that you experienced a northerly set?

A. No, they generally change according to the tides; [59] sometimes there is a strong set, and sometimes a light set; you never can tell how and when they change.

(Testimony of Joakim Martin Anderson.)

Q. Was the northerly set correlated to the tide, high tide or low tide?

A. I think on the ebb tide she will get a southerly set.

Q. A southerly set on the ebb tide?

A. Yes.

Q. And on the flood tide?

A. She may get a northerly set.

Q. Do you think the northerly and southerly sets were regulated by the ebb and flood tides?

A. Yes, and other currents, too, may cause it. There is no real theory on that.

Q. I suppose that you can't state, as to any particular time and tide, that there was any particular current, is that true? A. That is right.

Q. Captain, after you anchored the "Olympic" at Horseshoe Kelp, on May 9th, did you ever cause any notice to be issued to mariners by the hydrographic office, of the location of that barge?

A. No, but I put it over the radio, and put it in all the papers in Los Angeles; four radio stations.

Q. You were advertising for patrons to come aboard the barge? [60]

A. That was for the location, too.

Q. Was that a broadcast to mariners which you were making? A. Not mariners.

Q. What was the purpose of the broadcast?

A. It was to advertise that we were the best fishing grounds in California, and we caught more fish there than anybody else.

(Testimony of Joakim Martin Anderson.)

Q. You were advertising for the purpose of drumming up business, were you not?

A. Everybody that heard the radio knew that we were there.

Q. They heard you down in South America, and all parts of the world, is that right?

A. Yes.

Q. They were all tuned in to that particular broadcast?

The Court: Gentlemen, don't be facetious.

Q. By Mr. Adams: Captain, answer the question, please, whether you ever caused any notice to be issued by the hydrographic office of the location of the barge? That can be answered yes or no.

A. No. The hydrographic office, did you say?

Q. The hydrographic office. A. No.

Q. You know what office I mean, do you? [61]

A. Yes.

Q. That office issues regular notices——

The Court: Just a minute. There is no use in getting into an argument on that.

Mr. Adams: I was just endeavoring to illustrate the functions.

The Court: He said he knew.

Mr. Adams: Maybe I could assume that the court knows what a hydrographic office is.

The Court: You made it clear in your pre-trial brief, I think.

Mr. Adams: With the understanding, if the court please, that I would like to interrogate Cap-

(Testimony of Joakim Martin Anderson.)

tain Anderson further about these specifications, I will discontinue my cross examination at this time, so that other witnesses may be called.

Mr. Cluff: I will defer my redirect, if I may, too.

The Court: That is all for the time being. You are to remain in attendance at all times. [62]

BERTRAM WILLIAM GROTHE,

called as a witness on behalf of the libelants, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Bertram William Grothe.

Direct Examination

By Mr. Cluff:

Q. Mr. Grothe, you were a witness to the collision on September 4, 1940, between the "Sakito Maru" and the barge "Olympic II"?

A. I was.

Q. You witnessed that collision from a small boat operated by you and your partner, called the "Marell"?

A. That is right.

Q. State if you have had any experience at sea?

A. About 8 years ago I spent about two years on merchant ships, as an able bodied seaman; but outside of that only on small boats.

Q. In September, 1940, what business were you engaged in?

A. I was engaged in commercial fishing, with my partner, Mr. Walter.

(Testimony of Bertram William Grothe.)

Q. That is, in this boat, the "Marell"?

A. That is right.

Q. On the morning of September 4th, were you aboard the "Marell", you and Mr. Walter? [63]

A. Yes.

Q. Just tell us, during the night and morning of September 4th, how you approached the scene of the collision, or location where the barges were anchored—let me put it that way.

A. It happened that the previous night we had fished in Catalina waters, around the east end, and having no success we pulled anchor there about 2:00 or 2:30 and headed for Fish Harbor, and Horse-shoe Kelp being in the vicinity of our course we stopped there, and decided to work up some fish, which was in the neighborhood of 6:15 or 6:30, as I recall.

Q. That was in the morning?

A. In the morning, yes.

Q. Mr. Grothe, I want to show you a drawing by Captain Anderson, directed by Captain Anderson, which shows three shapes; that is, "Olympic" Exhibit No. 4, and it shows three shapes, marked respectively "Olympic", "Point Loma" and "Rainbow" barge. There is no attempt to draw the vessels or their distances apart to scale, but according to what you saw there that night, does that drawing fairly reflect the relative positions of those barges with respect to each other, the breakwater being in a southerly direction from the "Point Loma"?

Mr. Adams: I would like to ask the witness a question on voir dire. [64]

(Testimony of Bertram William Grothe.)

The Court: All right.

Q. By Mr. Adams: Mr. Grothe, had you ever had occasion, prior to this, to be at Horseshoe Kelp, and observe the location of these barges?

A. Yes, many times.

Mr. Adams: Since the "Olympic" had anchored there on May 9th? A. Yes.

Mr. Adams: No further questions.

Q. By Mr. Cluff: Without any idea that they are drawn to scale, they show the relative positions of the three barges, one to the other?

A. I believe it does, unless this "Rainbow" barge would be to the north.

Q. A little bit to the north?

A. In other words, more in line with the "Point Lima."

Q. That is your recollection of that?

A. Yes.

Q. You came about 6:00 o'clock in the morning, as you testified—you came to anchor in the vicinity of those barges? A. Yes.

Q. How long is the "Marell"?

A. The "Marell" is 29 feet.

Q. Where, with reference to the "Olympic", did you anchor? [65]

A. We anchored directly astern of the "Olympic", and possibly two boat lengths, that is, "Olympic" boat lengths, astern of the "Olympic".

Q. About 500 or 525 feet astern of the "Olympic"? A. In this position.

(Testimony of Bertram William Grothe.)

Mr. Adams: I wonder if you will point out if any attempt is made to keep this to the same scale; since the "Olympic" is shown at this length position, that the "Marell" would be twice the length of the "Olympic" away.

The Witness: This is not to scale. That would not do justice to the position of the "Rainbow".

Mr. Cluff: I will stipulate with you now, Mr. Adams, that in respect to the drawing——

The Court: Gentlemen, you have stated and restated a dozen times that this is not to scale and I so recognize it, and there is no use in continually repeating that.

Q. By Mr. Cluff: You anchored with a single bar anchor? A. That is right.

Q. How did the "Marell" lie to her anchor?

A. The bow to the north.

Q. I wonder if you will draw in a little shape at the point you have indicated, showing the "Marell" lying to her anchor? Let us mark that with an M, indicating "Marell", on "Olympic" Exhibit No. 4. In that position you have told us there was about two lengths of the "Olympic" [66] between your position, and the position of the "Olympic's" stern? A. Yes.

Q. Can you tell about how far it was from your anchorage there to the "Rainbow" barge, according to your observation at the time?

A. I would say the "Rainbow" barge was at least four times as far from us as the "Olympic" was.

(Testimony of Bertram William Grothe.)

Q. That is, if it was two lengths of the "Olympic", it would probably be about eight lengths of the "Olympic" over to the "Rainbow" barge?

A. Yes.

Q. About 2,000 feet? A. Yes.

Q. You arrived there, and came to your anchorage, at what time?

A. At approximately 6:15.

Q. 6:15? A. Yes.

Q. What was the condition of the weather as you approached your anchorage?

A. As I recollect, we sighted the barges some time before we arrived there; possibly as long as about 15 minutes before we arrived on the scene as we sighted the barges, or longer.

Q. Then, after you came to anchor, did that [67] visibility continue?

A. No, it became somewhat denser, rather irregularly; that is, there were clouds of fog, and they would obscure vision for a few seconds, and then it would clear up a little bit.

Q. Could you see, as you approached, and after you came to anchor, could you see all three barges?

A. Yes, as we approached and anchored, we could.

Q. After you came to anchor, how did you occupy yourself?

A. Mr. Walter stayed on deck, and tried to raise a school of fish by throwing bait over, while I went down and put on a pot of coffee, and when I had the coffee ready Mr. Walter and I had some breakfast.

(Testimony of Bertram William Grothe.)

Then he went back to the deck, and I stayed below, and laid down on a couch. [68]

Q. Did you observe during that time, shortly after you anchored, any passing powered vessels, that is, large vessels, steamers, or motorships?

A. Yes, we did.

Q. State just what you did observe in that connection.

A. We observed a Luckenbach steamer passing east of the "Rainbow" barge.

Q. Eastward, is toward Long Beach?

A. Yes.

Q. How did you know it was a Luckenbach ship?

A. We could make out the name along her side.

Q. Was she blowing a fog signal?

A. She was, yes.

Q. And it was the regular four to six signal blast?

A. That's right.

Q. Did any other vessels pass, prior to the appearance of the "Sakito Maru"?

A. We heard another vessel, but did not see it. It passed out of sight.

Q. In what direction?

A. It was coming in to San Pedro.

Q. Was it eastward or westward of you?

A. It was to the eastward of us.

Q. You say you heard that vessel; I take it, you heard the fog whistle? A. That's right. [69]

Q. About the time these two vessels passed did you hear any bells ringing from the barges?

A. Yes, at that time all of the barges were ring-

(Testimony of Bertram William Grothe.)

ing their fog bells.

Q. What time was that? When you say “at that time”, I wonder at what time you meant.

A. The two vessels, if I may elucidate, the two vessels did not pass at the same time. The Luckenbach steamer, as I recollect, passed possibly—this is very indefinite in my mind—possibly 10 or 15 minutes after we anchored, while the other steamer passed some minutes later.

Q. The one you did not hear whistle?

A. The one we did not see passed us some minutes later.

The Court: You did not see it but you heard it?

A. I heard it, but I did not see it.

Q. By Mr. Cluff: At the time you arrived, were the barges ringing their bells?

A. No, sir, I don't believe they were.

Q. When the fog got thicker, did the bells start?

A. Yes, sir.

Q. Could you hear the bells—

Mr. Adams: Just a minue, Mr. Cluff. I object to your leading the witness on this point.

Mr. Cluff: This is preliminary.

Mr. Adams: This is more than preliminary, the bells ringing. [70]

The Court: Objection overruled.

Q. By Mr. Cluff: How many of the barges did you hear ringing bells when the weather got thicker?

A. We heard all three very distinctly.

Q. Describe to the court the best you can, how the bells were rung, and how they sounded to you.

(Testimony of Bertram William Grothe.)

A. They had a rather distinctive tone. I don't remember in which order they rang, except they rang in regular order for the "Point Loma," for instance, and then the "Rainbow", and then the "Olympic".

Q. That is, they rang——

A. In rotation.

Q. About how long intervals did it take between each round of rings?

A. It seemed there was a bell ringing at least every 20 seconds, or 30 seconds possibly.

Q. So there would be a continuous round of ringing?

A. Yes.

Q. Was there any longer interval between periods of three rings, or did they all go about the same time apart?

A. No, they maintained a very constant cadence.

Q. Could you hear the diaphone or fog horn on the breakwater?

A. We could, at all times, yes.

Q. Were they ringing at about the same cadence, or at a greater or lesser cadence than the diaphone? [71]

A. That is rather hard to say, but I would think the cadence was approximately the same. I don't know.

Mr. Cluff: Will you stipulate that the diaphone blows every half minute?

Mr. Adams: The witness said he did not know.

The Court: His testimony is very indefinite. He said he does not know.

(Testimony of Bertram William Grothe.)

A. I did not correlate the two sounds, your Honor.

Q. By Mr. Cluff: I direct your attention to the ringing of the "Olympic" barge's bell. About how often did the peals come.

A. I beg your pardon?

Q. About how often did you hear the "Olympic" barge alone ring her bell?

Mr. Adams: That has already been asked and answered.

A. Between 45 seconds and possibly 70 seconds. I did not time them.

Mr. Cluff: We have got a little ship's bell here. I don't think this is going to make too much commotion. I am going to muffle this the best I can.

The Court: Nobody else has been muffled; I don't know why you should muffle that.

Mr. Cluff: I wonder if you will ring, as nearly as you can, the sort of peals you heard coming from the "Olympic".

Mr. Adams: How are you going to get this sound in the record? [72]

Mr. Cluff: I wonder if the court would mind timing it?

The Court: Let somebody else time it.

Mr. Adams: I broke my watch.

Mr. Cluff: Take mine; it's a good watch.

Q. Now, will you try to reconstruct the sound you heard coming from the "Olympic" bell?

(Witness rings the bell.)

Mr. Cluff: What did you get, Mr. Adams?

(Testimony of Bertram William Grothe.)

Mr. Adams: I got around five seconds.

Q. By Mr. Cluff: The other barges were ringing in rotation? A. Yes.

Q. About the same? A. That's right.

Q. After these bells started ringing, when the fog got thicker, did that ringing continue in the manner you have described, up to the time of the collision between the "Sakito" and the "Olympic"?

A. Yes, it did.

Q. That is, without cessation, and at the intervals you have told? A. That's right.

Q. I direct your attention to the next sound signal, aside from the bells, that you heard after the passage of the second vessel, which was off to the eastward; what was the next sound signal that you heard, if any? [73]

A. We heard a steamer's fog horn; not a steamer's—but an air horn.

Q. An air horn?

A. Yes; there is a distinction.

Q. In what direction did that bear from the "Marell", lying in the position you have described?

A. Roughly, the sound seemed to come from the south, which would be directly astern of us.

Q. Directly astern, you say? A. Yes.

Q. While you were lying at anchor, directly astern of the "Marell"? A. Yes.

Q. What sort of a sound was that, and its duration—how many blasts?

A. One blast and possibly six or seven or eight seconds' duration.

(Testimony of Bertram William Grothe.)

A. Yes; somewhat later. I don't know just how much later it was repeated.

Q. About how many repetitions of this signal did you hear before you saw anything?

A. Before we saw anything?

Q. Yes.

The Court: He was down asleep, taking a rest, the last time I heard. I want to know how he got up to see it. [74]

Mr. Cluff: I don't think he was asleep. He was below. Explain that to the court.

The Court: I want to know when he came up on the deck.

Q. By Mr. Cluff: Did you hear this while you were on deck, or down below?

The Court: Let him tell it in his own way.

A. To go into detail, as I lay down, I did not go to sleep. My partner, Mr. Walter, was on deck, and he had heard this previous steamer passing, and mentioned it to me that we should rig out our bell, and ring it, to play safe. At the time I mentioned to him that I did not think it was worth while, because we were within the triangle formed by the barges, but he decided to ring it, against my judgment, so he went ahead. He called my attention to the Luckenbach ship passing, and I got up off of the bunk, and looked through the cabin window, and saw that. Then I laid down again; then he called me once more, when he heard the blast from the motorship, which I also heard in the cabin, and at that time I went on deck.

(Testimony of Bertram William Grothe.)

Q. Did you get up when you heard the first blast?

A. Yes, when he called me.

Q. How far were you from the deck as you lay there in your bunk of the cabin?

A. It is a very small boat; just two or three steps. Our cabin was below deck.

Q. How did you get into the cabin, through a hatch? [75]

A. Through a hatch.

Q. You could carry on a conversation from the cabin to somebody on deck?

A. Yes.

Q. You came up on deck. At the time you came up could you see anything in the direction from which the whistle seemed to be coming?

A. No, sir, I could not.

Q. Go on from there, and tell us in your own way what did you see.

The Court: When you came up, could you see the barges?

A. I could.

The Court: All three of them?

A. Yes. As I say, I don't know whether we heard one more blast or two more blasts before we sighted the ship the "Sakito Maru", but she seemed to appear very close, and directly due south of us. When she first appeared, she was rather an indistinct picture, and she looked as though she were heading right for us.

Q. Could you see both bows of the steamer at that time?

A. Not immediately. For a few seconds it was just a black mass, and we couldn't tell which way she was heading.

(Testimony of Bertram William Grothe.)

Q. When you first saw this black mass can you give us any estimate of how far away it was?

A. Well, I should think she was easily a half a mile.

Q. From the point where you first saw the mass, will you [76] tell us in your own way with regard to the approach of the vessel?

A. The conversation?

The Court: What you saw.

Q. By Mr. Cluff: What you saw.

A. I saw the boat loom up, as she became more distinct, and in a very few seconds she seemed to be turning to her port, to our right as we were faced, and she seemed to be turning to her port.

Q. As exposed to which side of the steamer?

A. The starboard side.

Q. Go on with the narrative. She seemed to be turning to the port? A. Yes.

Q. In the direction of the "Olympic"?

A. Yes.

Q. Go ahead.

A. In a very short time she became very distinctly visible to us, so that we could make out her deck houses, mast and bridge.

Q. At that time could you see her side, the full side of the ship? A. Yes.

Q. That was which side?

A. That was the starboard side.

Q. Go ahead from that point. She came down where you [77] could see her. About how close, the closest position, did she pass from the "Marell"?

(Testimony of Bertram William Grothe.)

A. From the "Marell"?

Q. Yes. This being prior to the collision.

Mr. Adams: I object to the question as calling for the conclusion of the witness and assumes something not in evidence. It has not been shown that she did pass the "Marrell". She was coming in an entirely different direction, so that she could not pass the "Marrell".

Mr. Cluff: I will withdraw the question. Go ahead from the point where you said it got distinct, so that you could see her houses. What happened after that?

A. At that time it looked as though she were going to go ahead of the "Olympic", pass to the west of the "Olympic", in other words.

Q. That is, ahead of the "Olympic's" bow?

A. Yes. Then, as she came closer, we could see that she seemed to be, after all, going to hit the "Olympic". That was the way it appeared to us. We weren't sure that it was going to hit the "Olympic", or if it was going to miss, but as she came up we were very certain that she was going to crash.

Q. Did you observe what looked like a change of course, after she took this swing to the left, and went over in the direction of the "Olympic"?

A. Yes, we observed a swing apparently to her starboard. [78]

Q. That was the other direction?

A. Yes.

Q. After she made that apparent turn how did she head with reference to the "Olympic"?

(Testimony of Bertram William Grothe.)

A. She seemed to be heading almost directly into the "Olympic" then.

Q. As you observed the vessel make these maneuvers, could you form any estimate of her speed?

A. My estimate would be some place between seven and——

Mr. Adams: Just a minute, please. The question was could you form an estimate.

A. My estimate is——

Mr. Adams: No; are you able to form an estimate?

The Court: Answer yes or no, could you?

A. I think so.

Q. By Mr. Cluff: Will you say what you estimated her speed as being?

Mr. Adams: If the court please, I wish to object upon the ground that it calls for the conclusion of the witness, and no proper foundation has been laid.

The Court: Objection overruled.

A. My estimate is between 7 and 9 knots.

Q. By Mr. Cluff: With reference to your own boat, the "Marell", did she seem to be going, that is, with her full cruising speed, did she seem to be going slower than the "Marell's" cruising speed — faster or slower? [79]

A. Faster.

The Court: Will you read the question and answer?

(Record read by the reporter.)

The Court: I don't understand that.

(Testimony of Bertram William Grothe.)

Mr. Cluff: I propose to ask him now what the full cruising speed of the "Marell" was, and ask him to compare the full cruising speed of the vessel with the full cruising speed of his own vessel.

Mr. Adams: I object to that as calling for a conclusion of the witness, and assumes a fact not in evidence; no proper foundation has been laid; and it is incompetent, irrelevant and immaterial.

The Court: It goes to the weight of his testimony. The man has been a seaman for two years, and operating even a small boat should be in a position to give an opinion as to speed.

Mr. Adams: If the court please, I think it is two different things, judging the speed of a vessel upon which you are riding at the time, that being a small vessel, and judging the speed of a vessel that you see approaching, when you are on another vessel.

The Court: It depends on whether you are judging the speed by vibration, or the movement of the vehicle, or both.

Mr. Adams: In water you don't have any object against which you can measure distances.

The Court: That goes to the weight of the witness's [80] testimony. The objection will be overruled.

Q. By Mr. Cluff: What is the full normal cruising speed of the "Marell"?

A. Approximately 6 to 7 knots

Q. As the vessel approached this point where she made her apparent turn to starboard, could you

(Testimony of Bertram William Grothe.)

see the forward house, or the decks, or structure of the vessel clearly? A. Yes, I could.

Q. Did you observe any person on the forward deck, or forecastle head, or any other part of the vessel? A. I did not.

Q. If a man had been standing—I wonder if the depositions are available? I am showing you a photograph, Mr. Grothe, which is marked Petitioner's Exhibit No. 3, which purports to be a photograph of the starboard bow of the "Sakito Maru", showing the forecastle head above the name, and, as I understand it, the bulwark begins to——

Mr. Adams: Just a minute. I don't think it is competent, if the court please, for Mr. Cluff to explain to the witness the structure of the "Sakito", and then ask a question based upon that. He should ask the witness what he saw, and let him testify.

Q. By Mr. Cluff: I am showing you now a newspaper photograph of a vessel bearing the name "Sakito Maru", and I will ask you if you will look at that photograph, and tell us if that is the vessel that you saw collide with the [81] "Olympic" on the morning of September 4, 1940—if that is a fair picture of the vessel. A. Yes.

Q. Do you see standing up in the extreme bow a little figure there that looks like a man?

A. I do.

Q. If, as the "Sakito Maru" approached the "Olympic II", during the period you have described

(Testimony of Bertram William Grothe.)

here, she turned first to the left, and then to the right—if a man had been standing in the position that this little figure seems to be standing there in the bow with his body, from the navel up above the top of the bulwark, would you have been able to see him?

Mr. Adams: Just a minute——

The Court: I am going to say that the objection you intend to make is good. He can tell what he saw.

Q. By Mr. Cluff: Did you see any figure in the extreme bow of the “Sakito Maru” at that time, or any part of a human there? A. I did not.

Q. The head, shoulders, torso, or anything else?

A. No, sir.

Mr. Cluff: I will ask that the newspaper photograph, that part of it which shows the “Sakito Maru” be offered as “Olympic’s” next exhibit.

Mr. Adams: I will object to it upon the ground that it [82] is not shown in the testimony under what circumstances that photograph was taken, and it seems to me it is a very distorted photograph, if the court please, because it is taken down below, and it doesn’t even show clearly the damaged portion of the “Sakito’s” bow.

Mr. Cluff: I will submit the offer.

The Court: I don’t know why there is all the mystery about what the “Sakito Maru” looks like. The witness has identified it as being the boat he saw on that morning, and for that purpose it is admitted. If you want to present a better picture, you can do so.

(Testimony of Bertram William Grothe.)

Mr. Adams: If the court please, this newspaper picture, which Mr. Cluff introduces, contains a photograph of the survivors under rather pitiful circumstances.

The Court: The only part that is admitted is the part that contains a representation of the "Sakito Maru".

Mr. Adams: I move that the other inflammatory material be stricken from the exhibit.

The Court: The clerk is directed to use his scissors on it, so that the court will not be moved by the pitiful picture that counsel has described.

Q. By Mr. Cluff: At the time the vessel was approaching the "Olympic", as you have testified, did you consciously look for any person on the forward deck, or on the forecastle head?

A. Yes, we did. [83]

Q. So, at the time you were looking there, you had in mind searching out for a person somewhere on the forecastle head?

Mr. Adams: I object to that as already having been asked and answered, if the court please.

A. Yes, I did.

(Adjournment until 2 o'clock p. m. of the same day.) [84]

AFTERNOON SESSION

2 o'clock

BERTRAM WILLIAM GROTHE

recalled.

Direct Examination

(Resumed)

The Court: Proceed, gentlemen.

Q. By Mr. Cluff: When we were at the close you had just told us about seeing the "Sakito Maru" turn to her right toward the "Olympic". Can you give us an idea of about how far away she was from the "Olympic" when she made that right turn?

A. I imagine between three and two boat lengths, the "Sakito Maru" boat lengths, rather.

Q. Between three and two boat lengths.

A. Of course, the turn was not abrupt at the swing.

Q. Was it a right-angle turn or a short turn?

A. It was not a short turn; no.

Q. About the time it made that turn did you notice any difference in the ringing of the "Olympic's" bell?

A. At that time, I don't believe. I think they were still ringing conventionally.

Q. Then, at any time after she made that turn did you notice any difference?

A. Well, I think about the time the "Sakito

(Testimony of Bertram William Grothe.)

Maru'' was about a boat length, or about approximately 500 feet away, the ship's bell on the "Olympic" began to ring [85] continuously.

Q. Continuously. That is, not in peals, but just a steady clang-clang-clang?

A. That is right.

Q. Did it appear as loud or louder than is had before?

A. Louder.

Q. And a continuous, steady peal?

A. That is right.

Q. And that lasted how long?

A. Oh, possibly 10 or 15 seconds.

Q. 10 or 15 seconds. How long do you think it took between the start of that peal and the collision?

A. Well, the peal ran right up to the time of the collision.

Q. Right up to the collision. You had gotten up to the bell on the "Marell" and had that started ringing?

A. We had been ringing that for several minutes before this, oh, possibly 15 minutes.

Q. Had you started ringing the "Marell's" bell before the "Sakito Maru" came in sight?

A. Yes.

Q. By the Court: Is the bell on your boat manually operated?

A. Yes, sir.

Q. And your partner was doing the ringing?

A. Yes. [86]

Q. By Mr. Cluff: How big a bell is that one on your boat?

(Testimony of Bertram William Grothe.)

A. That is an 8-inch ship's bell.

Q. That was the same size as the one we have been using here for demonstration?

A. That is right. No; that is a 6-inch, isn't it?

Q. No; this is an 8-inch bell.

A. Yes. Well, ours was a large bell.

Q. After that right-hand turn as the "Sakito" approached the barge did you notice any slowing down of her speed? A. No.

Q. She apparently kept the same speed that she was going before? A. Yes; I would say so.

Q. And did you see, after she made the right-hand turn did you see anybody on the boat or anywhere on the focastle head of the vessel?

A. No. One time——

Q. At any time before the collision did you see anybody up there at all?

A. Not on the focastle head. I saw someone on the well deck.

Q. All right; the well deck—I am showing you this photograph of the "Sakito Maru" and marked Petitioner's Exhibit No. 3 in the limitation proceeding, by the way, [87] and ask you to point out to the court the focastle head.

A. The focastle head is this portion of the ship here.

Q. And the well deck is—indicating the level of the deck above the break and right over the name of the vessel. And the well deck area is where?

A. The well deck is from this point to the bridge, to the deck house.

(Testimony of Bertram William Grothe.)

Q. Will you state where you saw this man and what he was doing?

A. I saw this man some place aft the break here.

Q. Indicating the position on the well deck just aft of the break of the focastle head. And what was he doing?

A. He was running aft.

Q. Running aft towards the bridge?

A. Yes.

Q. Was he making any noise?

A. Yes. He was shouting and seemed to be waving his hands.

Q. Did you hear any other shouts from the vessel?

A. Yes.

Q. From the "Sakito"?

A. Yes; we heard the shouts from the bridge.

Q. Heard shouts from the bridge. How long was that before the impact?

A. Well, I would say within a half a minute of the time of the impact. [88]

Q. Was that after she made her turn to the right?

A. Yes.

Q. And after the "Olympic's" bell was ringing continuously, or before.

A. About the same time.

Q. Did you notice on the after end of the fore-castle head there was a railing composed of apparently rods or wires?

A. Yes.

Q. Did you see any man at any time in that area, any place forward of the bridge, including the fore-castle?

(Testimony of Bertram William Grothe.)

A. I saw no one at any time forward of the bridge, or on the forecastle.

Q. Your position, as you have testified, was somewhere about 500 feet or thereabouts, from there?

A. Yes. The fore part of the ship was outlined against the horizon.

Q. At the time, or just before the crash, did you hear any whistle signals from the "Sakito Maru"?

A. How long before the crash?

Q. You have testified about three long fog whistles. After she came in, some time after she made her turn, did you hear any whistle?

A. Not until almost the instant of the crash.

Q. That is, after you saw this man running aft?

A. Yes, within that half minute, all these things [89] happened. Just exactly what their chronological order was, I couldn't swear.

Q. Will you describe the whistle, the best you can?

A. Three short blasts.

Q. That is woo-woo-woo?

A. Yes. It was not a fog signal; it was a collision or reverse signal.

Q. The engines were going astern?

A. Yes.

Mr. Cluff: I will offer in evidence, in this case, the photograph as "Olympic's" next exhibit.

The Clerk: "Olympic's" Exhibit No. 6.

Q. By Mr. Cluff: After the crash took place, just what did you see with respect to the two vessels, from your viewpoint on the "Marell"?

(Testimony of Bertram William Grothe.)

A. The "Sakito" cut into the "Olympic," and he was still going at a good clip, and she seemed to push the "Olympic" possibly as much as a hundred, or over, feet, swinging on an arc on about her bow anchor.

Q. An arc in which direction?

A. Towards the "Point Loma," about her bow.

Q. It would be an arc toward the westward?

A. Toward the north I would say; northwest.

Q. Did that change the position of the "Olympic" so that you could see clearly either side?

A. Yes, it allowed us to see the port side; at least [90] that portion of it that was not hidden by the "Sakito Maru."

Q. Could you see the "Sakito Maru" change her heading in any way after the impact?

A. No, I did not notice any change of heading at the time of the impact.

Q. Did you notice whether her stern swung around to the right?

A. Yes. I wouldn't like to say I did notice, because I don't believe that I——

Q. Did it appear to you that the "Sakito" presented more of her stern to you than she had just before, or at the moment of the impact?

Mr. Adams: I object to the question upon the ground that the witness has already indicated that he does not know.

The Court: I think that is true.

Q. By Mr. Cluff: In the meantime, on the

(Testimony of Bertram William Grothe.)

“Marell”, what had you and your partner been doing from, say, about the time of the impact?

A. We had watched the progress of the “Sakito Maru”, and as soon as we became aware definitely that the crash was inevitable we made the decision to pull up anchor. Walter went on the fore deck of our boat and began to pull up anchor, while I went below to start the motor.

Q. Did you come back on the deck after starting the motor? A. No. [91]

Q. Were you able to observe from your position below anything that was taking place on the two vessels that were in collision?

A. Yes, just as well, or almost as well, as if I had been on deck.

Q. That is through what, the portholes or windows?

A. Yes; the windows run the whole length of the cabin.

Q. Tell the Court what you saw from the time you went below, with respect to the two vessels?

A. I think I went below just about the time that most of the action was taking place; just possibly, oh, 5 seconds before the crash, the actual crash, I could observe the progress of the “Maru”; I saw the actual impact from below, and saw the “Olympic” listing to port, or to her starboard, rather, and being swung about this arc, as I mentioned before.

Q. The “Olympic” took a list to starboard?

A. Yes.

(Testimony of Bertram William Grothe.)

Q. On the impact? A. Yes.

Q. Could you tell about how much of a list, in degrees?

A. I would say about as much as 15 degrees list, or possibly more.

Q. 15 degrees to starboard? A. Yes. [92]

Q. About what time did the "Marell" start to move, if at all?

A. The "Marell" started to move about the same time that the "Maru" was backing up.

Q. Who took the wheel?

A. I was at the wheel.

Q. Then did you see the "Sakito Maru", or did you see the vessels separate, the "Olympic" and the "Sakito Maru" separate? A. Yes.

Q. Could you tell whether the "Sakito Maru" was backing out, or whether they were separating through some other means?

Mr. Adams: I object to that as calling for the conclusion of the witness. I have no objection to his stating what he observed.

The Court: I think that is true. The objection is good.

Q. By Mr. Cluff: Could you see the water wash, if any, from the "Sakito Maru's" propeller?

A. No, I did not observe the water wash of the propellers.

Q. Just tell us what you saw after the collision, and the vessels had come to rest in the water.

A. I saw, as the "Sakito" came into the "Olym-

(Testimony of Bertram William Grothe.)

pic'', and listed at the port, and pushed it through that arc, it seemed to hang there for a very short time. I don't like [93] to say the minutes or seconds, but it was probably less than a minute. Then she reversed, and she pulled out of the hole.

Q. You say she reversed. How do you know she reversed?

A. I mean reversed her direction. I don't know about her engines.

Q. How much separation took place?

A. The "Sakito" continued to reverse some distance, possibly half a mile, at least she left the scene for that distance. Whether she was all the time in reverse or not I don't know. My attention was focused on the wreck at the time.

Q. She moved back away from the "Olympic"?

A. Yes.

Q. A very considerable distance? A. Yes.

Q. Did you notice any disturbance of the "Olympic's" structure as the "Sakito" separated from her?

A. On the deck?

Q. Yes, anywhere.

A. Yes, the deck house seemed splintered, and the planking seemed to be flying about.

Q. Did you hear any noise at the time they pulled out?

A. It was a sort of a grinding crunching noise.

Q. What happened after the "Sakito" pulled out, with [94] respect to the "Olympic"?

A. The "Olympic" righted; swung a little bit to

(Testimony of Bertram William Grothe.)

her port, and then righted, and then went down very rapidly.

Q. At that time were you in a position to see the starboard side of the "Olympic"?

A. No; the port side.

Q. Then you couldn't see the water taxis alongside, if there were any? A. No, sir.

Q. You couldn't see anything that was going on at the gangway? A. No.

Q. About how long after the boats separated did the "Olympic" go down?

A. I don't think it was over two or two and a half minutes.

Q. Had you been able to obtain with the "Marell" the approximate position of the "Olympic" at the time she went down?

A. We weren't quite up to it.

Q. After the "Olympic" went down, what did you do?

A. We kept the lookout for any survivors that we could possibly have picked up.

Q. Did you find any survivors, or did you find any bodies?

A. No, sir; we found a body. We did not find [95] survivors.

Q. Was that body identified in your presence?

A. Yes.

Q. Who was it? A. Curtis Johnson.

Q. That was the only body or survivor that you picked up with the "Marell"?

(Testimony of Bertram William Grothe.)

A. That is right.

Q. Did you notice whether the "Sakito Maru" had a lifeboat in the water?

A. We noticed that she did not have a lifeboat in the water.

Q. Did you ever see a lifeboat of the "Sakito Maru"? A. Yes.

Q. When with reference to the sinking of the "Olympic"?

A. At the very least, over an hour after the collision.

Q. As you approached the wreck with the "Marell", about how fast did you go?

A. We probably picked up a headway and in about 100 feet or so we were probably going about 5 or 6 knots as we approached the scene.

Q. Going back to the separation of the "Sakito Maru" and the "Olympic", from the time they separated did the distance increase constantly?

A. Yes. [96]

Q. You have fished in the waters around San Pedro Bay for a number of years?

A. We fished commercially only the past year, but I have fished, sport fishing.

Q. Are you familiar with the waters of what they call Horeshoe Kelp, where these barges were anchored? A. Yes.

Q. How many years have you been familiar with those waters?

A. Ever since I have been in California.

(Testimony of Bertram William Grothe.)

Q. That is how long? A. Six years.

Q. Have you fished in those waters at various times during those six years?

A. A number of times.

Q. As often as every year? A. Yes.

Q. On what sort of vessels?

A. I haven't been on the "Olympic", but I have been on the "Belmont" several times previous to this.

Q. The "Belmont" is what is called the "Rainbow" barge?

A. Yes, the "Rainbow" barge; as well as live bait boats.

Q. Have you had occasion, on your visits to Horseshoe Kelp, in 1940 and previous years, to observe whether or not [97] there were various types of fishing vessels that were using those waters, at anchor, or drifting about fishing? A. Yes.

Mr. Adams: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. I don't believe I have ever been out there that there hasn't been some part of a fishing fleet, commercial, as well as sport fishing boats, in that vicinity.

Q. By Mr. Cluff: Will you tell on the average how many vessels you have seen around in that vicinity fishing in the Horseshoe Kelp, within the range where the three barges were lying?

Mr. Adams: I object to that as speculative, in-

(Testimony of Bertram William Grothe.)

competent, irrelevant and immaterial. What difference does it make what the average was?

Mr. Cluff: My purpose is to show that this is a well established and a long established fishing ground, and there is regularly there a large number of vessels, of all classes.

Mr. Adams: How does that bring notice to the skipper of a foreign vessel?

Mr. Cluff: I think it is material, if we show it is a well established fishing bank and he is charged with notice.

The Court: Objection overruled.

Mr. Adams: If the Court please, that skipper might come [98] into this port for the first time.

The Court: I might walk down a street for the first time, and I would have to keep my eyes open.

Mr. Adams: If you are coming through a fog, you can't see anything with your eyes open, and how would you know?

The Court: But the libelant raised the question, and cited, as you are aware, a number of authorities on the question of fishing grounds, and the liability of vessels in that vicinity, and I am going to permit the libelant to introduce his evidence on that, because I realize, and the rest of counsel realize, that eventually there will be a trial de novo of this case in the Circuit Court, and I want all the facts before them.

Mr. Adams: I wish to add the objection that the evidence is, of course, additionally incompetent,

(Testimony of Bertram William Grothe.)

irrelevant and immaterial, because the conditions described by the witness, and asked for in the question, could not have been brought to the attention of the master of the "Sakito Maru", or any of her officers, or in fact the master officers of any ship.

The Court: Same ruling.

The Witness: May I have that question?

Mr. Adams: I add the further objection, no proper foundation laid in the matter of establishing any custom or practice.

The Court: All this witness is testifying to is what he [99] has observed himself. You may answer the question.

(Question read by the reporter.)

A. As to an average, there might be days when there would only be three or four fishing boats out there. When the fish happen to be hitting there, there might be 100 or 150 boats in that same locality.

Q. By Mr. Cluff: Have you ever been out there fishing on a Saturday, Sunday or a holiday?

A. Yes; often.

Q. On those days could you give us any idea of the number of boats?

Mr. Adams: May my objections be considered as running to this entire line of questioning, if the Court please?

The Court: Yes. It is understood that respondent's objection continues to run against evidence that tends to show that this was a fishing ground, a recognized fishing ground by the public.

(Testimony of Bertram William Grothe.)

A. On Saturdays and Sundays, of course, sport fishermen were out there a great deal heavier than they were on week days, and there were several hundred boats out there on any Saturday I have ever visited the fishing grounds.

Q. By Mr. Cluff: That is, right on the bank within the area covered by these three barges?

A. Yes, sir.

Q. By the Court: How large an area is this area [100] they call the "Horseshoe Kelp"?

A. It is quite extensive a reef in the shape of a horseshoe. That is where it gets its name. And any portion of that reef is favorable to fishing. The Barges are anchored approximately on that reef in the circle, you might say, that that reef forms. I don't know just exactly how extensive the area is, but the boats are usually scattered over an area of about a mile there, a square mile.

Q. By Mr. Cluff: Will you state the various kinds of boats you have observed out there, private, sport, fishing boats? You have mentioned bait boats. What do we mean by a bait boat?

A. A live bait boat is a boat that takes out passengers at so much a passenger.

Q. It functions like these fishing barges, except it moves about? A. Exactly.

Q. Have you seen other types of commercial fishermen like yourself?

A. Yes; a good many commercial fishermen.

Q. Are these boats all at anchor or at rest as they lie there and fish?

(Testimony of Bertram William Grothe.)

A. It depends on what type of fishing they are doing. If they are fishing with live bait they will anchor. A large majority of these live bait boats that take passenger, [101] they fish with live bait and anchor, and smaller commercial boats troll, and they apparently move about on the fishing grounds.

Q. Moving about slowly and trolling their live bait?
A. Use group nets.

Q. The system you were using on the "Marell" that night, was your vessel at rest with anchor or drifting?

A. No; we were at anchor. We were doing a different type of fishing.

Q. What type of fishing were you doing?

A. We were fishing with mackerel.

Q. With hand line?

A. No; group nets, bait nets.

Q. That is, you bait the net and the mackerel come up and you grab them?

A. That is right; we scoop them out if we can.
The Court: If you can.

Q. By Mr. Cluff: Do you know during the six years you have been familiar with "Horseshoe Kelp" of any other fishing barges having been anchored there, with the exception of the "Point Loma", the "Rainbow" and the "Olympic"?

A. I don't recall any others.

Q. Do you remember an old barge named the "Empress"? Did she ever lie out there to your knowledge?

(Testimony of Bertram William Grothe.)

A. No; I don't believe I was familiar with her.

Q. I am not sure myself. Anyhow, you know that the [102] "Point Loma" and the "Rainbow" were around there a number of years previous, each year?

A. The "Point Loma" moved up from the south.

Q. Do you know in what year?

A. I don't know whether they were there the year before 1939 or not.

Q. How about the "Rainbow"?

A. The "Rainbow" had been there for some time. The "Rainbow" was an established barge there.

Q. By "some time" you mean several years?

A. Yes.

Mr. Cluff: That is all, thank you.

Cross Examination

Q. By Mr. Adams: Mr. Grothe, I believe you stated that about 8 years ago you were an A. B. seaman and had followed that occupation for a period of about two years?

A. Yes, sir.

Q. Is that correct?

A. That is right.

Q. When you discontinued that occupation what work did you take up?

A. I came out to California and went to work for a construction company, Winston Brothers & Company.

Q. What type of vessels did you serve on when you were an A. B. seaman? [103]

A. I served on the Luckenbach boats.

Q. On the intercoastal run?

A. That is right. And I also served on a coast-wise vessel on the east coast.

(Testimony of Bertram William Grothe.)

Q. How long did you continue to follow the construction business?

A. Well, I was rather irregularly employed since I have been out here. I worked for Winston over a period of three years, off and on.

Q. And you came out here at what time?

A. 1935. Do you want a correct list of my jobs since I have been here?

Q. No; I am not particularly interested in the name of your employers; but I am just trying to find out what type of work you have followed since you left the sea. And, as I understand, you followed the construction business?

A. Mainly, yes.

Q. Mainly. Did you continue to follow work of that character up until the time you started in to fish commercially?

A. I had no connection with the sea, if that is what you want to know.

Q. Yes; that is what I mean.

A. Until the time that we got the fishing boat.

Q. When was that that you bought it?

A. That was in December of 1939. [104]

Q. How long did you continue to operate that boat and fish commercially?

A. Until December of 1940, one year.

Q. About one year. Since that time your occupation has not been connected with the sea, has it?

A. That is right.

Q. You are presently employed in the aviation parts manufacturing business?

(Testimony of Bertram William Grothe.)

A. That is right.

Q. Did you continuously fish commercially from December, 1939 to December, 1940, or were there certain seasons that you fished and other seasons when you did not fish?

A. We fished during the early months until, I think, about the latter part of March or the beginning of April, continuously commercially, that is, at least on an average of four or five days a week, or nights a week. After that we overhauled our boat and fished sport fishermen, took parties out sport fishing. So we were not out every day, but we were out probably on an average of two or three days a week at least. And then we started again on the mackerel toward the end of the year, say, about—no; we started in July. In July we started mackerel again.

Q. You spoke of these fishing boats being in the vicinity of Horseshoe Kelp. Was that condition that you have described true of all times of the year?

A. No; it was true, more so—there were different [105] ships there during the sport fishing season, which ranges from April through, oh, October, or to October at least. There were a good many sport fishing boats in that region. During the winter months it was pretty well confined to commercial fishermen.

Q. Do you know what time of the season or year that the fishing barges, that is, the "Rainbow" and the "Point Loma" moved out to the Horseshoe Kelp and were anchored there?

(Testimony of Bertram William Grothe.)

A. I couldn't say when they moved out; no.

Q. Do you recall whether they were there, for instance, in January or February of 1940?

A. I knew—no; the "Point Loma" wasn't, I am sure, and I am fairly sure that neither the "Olympic" nor the "Rainbow" were there.

Q. On all the occasions when you and your partner fished commercially, which, as I understand it, you did about four or five days a week, you did not go to Horseshoe Kelp on each of those occasions, did you?

A. No. No, indeed.

Q. There were other areas where you fished, is that correct?

A. That is right.

Q. Then when you were taking out sport fishing parties you did not always take those parties to Horseshoe Kelp, did you? [106]

A. That is right.

Q. Have you any idea of how often, maybe, during the summer months you took sport fishing parties out to the Horseshoe Kelp, let us say, since the middle of May, until the time of the collision?

A. Well, I can put it on a percentage basis. Probably three out of four times we stopped there, either coming or going to other fishing ground, to try there or else just fished there exclusively.

Q. I see. Were you taking out sport fishing parties at the time of the collision, or had you discontinued doing that?

A. We had discontinued sport fishing at that time.

(Testimony of Bertram William Grothe.)

Q. Did that type of fishing end along about Labor Day?

A. No. Some of the sport fishing boats ran later on into the year; but, of course, most of the fishermen stop fishing about Labor Day, the sport fishermen.

Q. At the time that you and your partner approached the barges after leaving Santa Catalina Island on the morning of the collision, I believe you testified that you sighted the barges about 15 minutes before you arrived at Horseshoe Kelp, is that correct? A. Yes.

Q. Had you encountered any fog between Santa Catalina Island and Horseshoe Kelp en route? [107]

A. No.

Q. What time did you leave Santa Catalina Island, do you recollect?

A. As I recollect, it must have been between 2:30 and 3:00.

Q. As you approached Horseshoe Kelp were you able to see any fog ahead of you?

A. I couldn't see the shore line. It was hazy.

Q. It was hazy? A. That is right.

Q. As you approached Horseshoe Kelp and the fishing barges anchored there did you hear any bells sounded by them?

A. No; not at that time.

Q. It was not until after you came to anchor there that you heard them commence sounding their bells, is that correct? A. That is right. [108]

Q. Have you any idea how long you had been

(Testimony of Bertram William Grothe.)

there after about 6:15 before you heard the first bell sounded by one of the barges?

A. I don't see that I can very well state it in minutes. I can say that we were there a very short time, if that will help you, and I can't say it was two minutes or ten minutes.

Q. I see. I believe you testified those bells were rung in order, first one barge would sound a distinctive bell, followed by another. Then I believe you said the last barge was the "Olympic" that sounded a distinctive bell, is that correct?

A. That is right. Now, I don't know what order they rang in, except that they rang in a regular rotation.

Q. I believe you testified that there was a bell ringing about every twenty to thirty seconds?

A. Yes; I did.

Q. Is that your recollection of it now?

A. That is my best recollection; yes.

Q. You mean by that, that at least one of the barges was ringing a bell? A. That is right.

Q. And there was not more than thirty seconds interval between the bell of one barge and the bell of another; is that what you mean?

A. That is right.

Q. About how long elapsed between each bell sounded by [109] each barge; in other words, how much time elapsed between a bell sounded by the "Olympic" and the next bell sounded by that barge?

A. The next bell sounded by the "Olympic"?

Q. By the "Olympic", yes.

(Testimony of Bertram William Grothe.)

A. Well, roughly, a minute from the time of one ringing to the time of the next ringing of the same barge.

Q. Of the same barge? A. That is right.

Q. I believe you testified that within a period of ten or fifteen seconds prior to the impact you heard the bell of the "Olympic" being sounded continuously? A. Yes.

Q. Is that right? A. That is right.

Q. Was there any difference in the tone of the bell or the apparent strength of the strokes; in other words, was it louder?

A. It sounded pretty frantic. Well, as you might say, that the man was exerting himself to ring it just as loudly as he possibly could.

Q. Was the bell being sounded then more loudly than it had been up to that time?

A. Possibly. Yes; it was ringing faster and more violently. Yes.

Q. Well, do you have any distinct recollection now that [110] the bell, while it was being sounded continuously, was also sounded more loudly than it had been previously?

A. It impressed me that way; yes.

Q. On the many occasions when you say you have been out there at Horseshoe Kelp prior to this was there ever fog?

A. Yes; there were fogs at various times there.

Q. Do you recall having been out during fog since the "Olympic" was anchored at Horseshoe Kelp,

(Testimony of Bertram William Grothe.)

that is, prior to the collision, some other occasion prior to the collision.

A. I can't recall any particular date, but I know that we were out there in foggy weather several times throughout the year that we fished there, and probably some of them included the summer months when the barges were there.

Q. On these other occasions did you notice bells being sounded by the barges? A. Yes.

Q. While it was foggy? A. Yes.

Q. Were they ringing their bells on those occasions with about the same strength as the bells were being sounded prior to the time that you heard the bell of the "Olympic" being sounded continuously?

A. Yes.

Q. In other words, prior to fifteen seconds before the impact the bells were being sounded as you had always heard them before? [111] A. Yes.

Q. With respect to the strength?

A. That is right.

Q. Now, would you say that during the time, prior to the sounding of the "Olympic" bell continuously, those bells were being sounded lightly?

A. Definitely not.

Q. Do you know the purpose of the distinctive rings of those bells?

A. No; I don't. I surmise it is to just identify themselves, so that the approaching ship knows there is more than one ship at anchor there. That is my assumption, but I don't know.

(Testimony of Bertram William Grothe.)

Q. That is just your assumption?

A. That is right.

Q. I believe you stated that you were down below when you first heard a whistle coming from the direction that the "Sakito" later appeared from, is that correct? A. Yes.

Q. How many blasts or signals did you hear from her whistle prior to the time you actually sighted her through the fog? A. Either two or three.

Q. At the time you first heard——

Q. By the Court: Were those blasts one following the other or—— [112]

A. No, sir. They were intermittent blasts of, roughly, a minute.

Q. By Mr. Adams: In other words, there were intervals of a minute between each of the three blasts? A. Yes.

Q. That you heard? A. Yes; that is right.

Q. Did the second blast seem louder than the first blast that you heard? A. Yes.

Q. Was the first blast that you heard loud, or fairly loud, or dim, or very dim? Can you give us some sort of description of it?

A. I don't know. You almost would have had to have heard a fog horn at sea to be able to judge that. I don't know how "very dim" sounds to you. I know how it sounds to me.

Q. Well, we will have to accept your description of it. Can you give us your description of it?

A. Well, it was easily heard.

Q. It was easily heard?

(Testimony of Bertram William Grothe.)

A. Yes; although it was hard to define the exact direction of it.

Q. Of course, that is always true of hearing whistles in fog, isn't it? A. That is right; yes.

Q. What was the first portion of the "Sakito" that you [113] saw when you first sighted that vessel?

A. It is almost impossible to state which portion. It loomed up as a mass. The first sight you had was just a black mass which was very indistinct in the distance.

Q. In other words, the impression that you first received when you sighted her was of a black mass, is that correct? A. That is right.

Q. When was it with reference to seeing her and being impressed as seeing a black mass that you saw her make any turn which you construed to be a turn to her port; about how much time elapsed?

A. Well, it developed in a very short time. She became more clearly visible in a very few seconds, and whether it was just a matter that she became visible to us as a ship rather than just an indefinite something, or whether she was actually swinging, I don't know. That is a matter of conjecture. But it all happened over a space of a very few seconds that she became definitely a ship.

Q. I see.

A. And at that time we could see more of her side than we could at the very first.

Q. And that gave you the impression that she was swinging to the left? A. That is right.

(Testimony of Bertram William Grothe.)

Q. Could you see more than a black mass at that time? At the time you thought that she was swinging to the left, in [114] other words?

A. Yes; we could. We could definitely see a shape of the ship and identify her as a ship.

Q. Could you see her superstructure?

A. Yes.

Q. That was painted white, wasn't it?

A. That is right.

Q. Do you know how far up her superstructure you could see? Could you see clear to the top of her masts?

A. That is not a very fair question because it progressed.

Q. I see.

A. At first we could—first, the black hull became distinguishable, and, as the ship approached we could make out the rest of the detail.

Q. I see.

A. Just exactly at what point in the matter of time it was, I couldn't say.

Q. Well, in any event her masts were not visible to you when you first saw this black mass?

A. No.

Q. Were her masts visible to you when you received the impression that she was swinging to the left?

A. They were becoming visible.

Q. Were they clearly visible; that is, in other words, could you see clear to the tops?

(Testimony of Bertram William Grothe.)

A. Of course, we saw the foremast first, and began to see [115] more of the detail of the ship as it approached.

Q. When you later received the impression that she was swinging to her starboard, or to the right, were all of the masts,—by that, I mean clear to the top of both masts—visible to you?

A. The whole ship was very much in detail visible.

Q. Could you see any change in the distance between her masts at that time, or were you watching the masts?

A. No, she was really a little bit too close for us to be able to judge it that way, inasmuch as she was passing us too, but the change in direction was judged by me, at least, in the view we had of her bridge or her midship deck house, which at first presented a rather perpendicular view, and then we could see more of the face of it, if you see what I mean.

Q. Yes, I see what you mean.

A. That's why I formed the opinion that she was swinging to starboard.

Q. Where were you at the time you were watching her, when her deck gave this impression to you—her bridge gave this impression to you? Were you on the deck?

A. I was still on deck.

Q. At the stern of your boat?

A. Amidships. There isn't much difference on that boat.

Q. Your prior observation of her course then was

(Testimony of Bertram William Grothe.)

without any reference to her masts, is that correct?

A. What do you mean by prior? [116]

Q. I will withdraw the question. While you were at sea did you ever stand lookout? A. Often.

Q. Isn't it usually the practice to judge the course of a ship, especially on approaching you, by separating her masts?

A. The range lights are for that purpose. Yes, that's right.

Q. Were you given any assistance in forming your observations as to her course by judging her masts on that occasion?

A. Not until she became plainly in view, and that was after she had made the initial turn to port; at least what we thought was the initial turn to port, and after that we could see the ship, as I say, in fine detail and we could make out her masts and all her superstructure, and everything, but before that we couldn't use her masts, because they weren't visible to us.

Q. And the thing that impressed you that the vessel was swinging to the right——

A. To the left.

Q. What gave you the impression that she was swinging, was by virtue of the fact that more of the bridge was over to your view?

A. More of the front of the bridge.

Q. The forward end of the bridge?

(Testimony of Bertram William Grothe.)

A. That's right.

Q. Have you any idea, in terms of degrees, how far she [117] might have swung on that occasion, to the right?

A. That would be, at the best, a guess, if I were to make it.

The Court: Let us not give any guess.

Q. By Mr. Adams: I won't ask you for that, if you are not sure.

A. I don't feel that I can give you a good answer on that.

Q. How high was your deck, that is, the deck of your boat, above the surface of the water at that time, if you have any idea on that?

A. Oh, two feet; just barely above.

Q. You don't have any more freeboard than that?

A. No; that's more than some of them.

Q. That is true. Would you say that the speed of the "Sakito Maru", as you saw her approaching, was not over eight knots per hour?

A. I wouldn't say it was not over eight knots an hour, no, sir.

Q. Do you recall having testified before the A. Board at San Pedro? A. Yes.

Q. That was on September 6, 1940?

A. That is right.

Q. Referring to the question and answer which appears on page 324 of the transcript of that proceeding, will you tell me whether you recall this question being asked you, and [118] whether you recall giving this answer:

(Testimony of Bertram William Grothe.)

“Q. At what speed do you think it was traveling? Can you estimate the speed she was going?”

“A. I would estimate not over eight knots.”
Do you recall that testimony at that time?

A. I don't recall having made that definite answer, no.

Mr. Adams: May it be stipulated, Mr. Cluff, that this testimony that I have read appears in the transcript of the A Board hearing?

Mr. Cluff: I will have to see the transcript. I will stipulate that what you read appears in the transcript.

Q. By Mr. Adams: I believe you testified that just immediately before the impact you went down below, and saw the actual impact from below, is that true?

A. That is as I remember, yes.

Q. Did you have a porthole down there, or do you have windows in your cabin?

A. No, windows in our cabin run the entire length of the cabin, both sides.

Q. Did you continue at that time to watch the “Sakito” and the barge, or did you go about some activity, such as starting the engine?

A. Well, I continued watching, as well as starting the engine. There was no necessity for my taking my attention away from the ships in order to start the engine.

Q. How long did you keep your eyes focused on the “Sakito” and the “Olympic”, beginning with

(Testimony of Bertram William Grothe.)

the time of the impact? [119] In other words, I would assume, while you were starting your engine, you certainly had to look at something to get it started?

A. No, sir, no more than you would have to to start your automobile. The way our boat was, we had an automobile engine, and the ignition switch and choke were on the dashboard, and you wouldn't have to pay any more attention to that than you would to your car.

Q. Did you get your engine started right away, without difficulty? A. Yes.

Q. As soon as you got your engine started, did you then devote your attention to the operation of the boat?

A. The engine was running some seconds before we got under way, because the anchor was being pulled.

Q. What did you do immediately after you got the engine started? A. I just waited.

Q. Did you keep your eyes focused on the "Sakito" and the "Olympic"? A. Yes. [120]

Q. When you took your eyes off those two vessels to devote your attention to operating the boat, where was the "Sakito" with reference to the "Olympic"? In other words, were they then together at that time?

A. To be frank with you, my memory is not as accurate on that, as to exactly when I looked away to turn the switch on; I couldn't tell you.

Q. I understood from your direct testimony, and

(Testimony of Bertram William Grothe.)

this is the purpose of my question, that after you saw the "Sakito" separate from the "Olympic" the first time, when she just separated, you did not continue to watch the "Sakito" or the "Olympic."

A. No, I didn't continue to watch the "Sakito". When I was conscious of the "Sakito" leaving the scene of the accident my attention, of course, was concentrated on the "Olympic" rather than on the "Sakito".

Q. Do you know, under those conditions, whether the movement of the "Sakito" in reverse was constant and continuous?

A. I know up to a certain point, up to the time she left the field of my attention, her movement was in reverse.

Q. About how far was her stem from the "Olympic" at that time?

A. Possibly half a ship's length.

Q. From that point on you have no knowledge concerning whether her movement astern was continuous or constant? [121]

A. Only by the deduction I made after I saw her anchor.

Q. When you saw her further back?

A. After she dropped her hook I noticed how far she was then.

Q. About how far was she when she eventually dropped her hook from the scene where the "Olympic" was, before she sank?

A. Possibly almost a half a mile, I imagine.

(Testimony of Bertram William Grothe.)

Q. What was the condition of the fog at that time, that is, as you were approaching the "Olympic" and the "Sakito" was backing away; was it as dense as at the time of the collision?

A. Let me impress you with the fact that we were a very short distance away, and the fog was not felt by us at all at that particular moment, because everything was in clear view, so far as that is concerned—the ships, barges, and all, were in clear view at that time. Whether the shoreline was visible, I don't know. I didn't look for it. But the ships were all visible.

The Court: There was quite a little excitement about that time, wasn't there?

A. Yes, there was a little activity.

Q. By Mr. Adams: How far through the water do you believe the stern of the "Olympic" moved after the impact until she came to rest?

A. Judging by the fact that at the moment of the impact we were directly astern of her, and at a later time when [122] the "Sakito" pulled away, her port was clearly visible to us, she probably swung through maybe two points. I don't know what, in terms of feet, or how great an arc she described.

Q. Do you have any recollection now where her stern was after her momentum stopped, from the position in which her stern was while you were still anchored behind her?

A. In feet?

Q. Yes; in other words, did she swing in an arc

(Testimony of Bertram William Grothe.)

of about 25 yards or 50 yards or 75 yards, or what? If you have any recollection on that?

A. I would say possibly 50 yards; in that neighborhood.

The Court: As I understand it, when you first saw the "Sakito", she came through the fog, and you saw this black mass about a half a mile away the first time you saw her.

A. I judge it was about a half a mile, yes.

Q. When she backed away, was she in fog, when she came to anchor?

A. The fog lifted very rapidly after that; as a matter of fact, I think the sun was beginning to break through, and there was visibility a few minutes after, some 15 minutes after the crash; it was improving continuously.

Q. By Mr. Adams: Is it correct, Mr. Grothe, that the bell on the "Olympic" was not sounded continuously until the "Sakito" was about one length away from the "Olympic"? That was your testimony on direct examination? [123]

A. Yes, that is right; that was my interpretation.

Mr. Adams: No further questions.

Mr. Velpmen: If your Honor please, as a point of information, I would like to know what the position of the libelants is as to this witness. This man has identified the body of Curtis Johnson; that the body was identified in his presence. Are we at liberty to go into that a little further at this time? It doesn't go to liability, but it goes to my case.

(Testimony of Bertram William Grothe.)

The Court: What feature of your case? We are only trying the question of liability. Your claim is a death claim.

Mr. Velpmen: That's right.

The Court: And the testimony here is that he recovered the body of a party whom you represent. What further can we develop in the way of your case at this time, outside of going into the question of liability?

Mr. Velpmen: As to the identity being a little more exact.

The Court: There is no dispute in this case as to this party having lost his life, is there, gentlemen?

Mr. Adams: I wouldn't say there is any dispute about it, if the court please. I don't intend to make any issue about it.

The Court: As I understood the situation, all sides have agreed that eight people lost their lives; possibly [124] nine?

Mr. Velpmen: No, seven; possibly eight.

Mr. Adams: That's right.

The Court: This isn't the possible eighth, is it?

Mr. Adams: That is correct.

The Court: What is the use of wasting the time of the court and everybody else, in trying to prove death, if you people all recognize that he died. For instance, his body was recovered, and there is no legitimate argument about it unless it is claimed that this was not his body.

(Testimony of Bertram William Grothe.)

Mr. Adams: No, only that I would like to have, if the court please, just a brief bit of evidence by someone as to identity. I don't intend to make an issue about it, but at the same time I am not in a position to know.

The Court: You never knew this man before, did you?

The Witness: No, I did not.

Mr. Black: Wouldn't it be more desirable to leave the identity of the decedents until later on, on damages, in this case?

The Court: That was what I assumed would be done.

Mr. Black: We are perfectly willing and content to leave that until a later time. If counsel desires to put on his proof at that time, we will have no objection to that.

The Court: This man can't identify this decedent except by what somebody else told him.

Mr. Velpmen: Only that he can identify the clothing.

The Court: Certainly you have someone who knew the [125] decedent in his lifetime, and can make a positive identification, and simplify the matter.

Mr. Velpmen: It was just a matter of caution on my part.

The Court: If we get technical on that, we will take care of the situation.

Mr. Adams: I don't intend to, if the court please, but I do want some evidence——

(Testimony of Bertram William Grothe.)

The Court: I understand the necessity of the proof of death, but I assumed that the parties all recognized that a certain number of people, and certain individuals, lost their lives, and you are not going to make an issue out of it; so that we won't have to go to any great length in establishing these facts. I assume that any body who knew the decedent in his lifetime could testify, but this witness did not know him. He recovered the body that he was told was Johnson. You may ask him if you want—what did you do with the body?

The Witness: We turned the body over to the Coast Guard vessel. Mr. Johnson came aboard our boat.

Mr. Black: May it be understood, Mr. Adams and Mr. Cluff, that proof of identification of the decedents may be reserved until a later hearing on damages?

Mr. Cluff: So stipulated, so far as Hermosa is concerned.

Mr. Adams: It is agreeable to me, if the court please.

Mr. Velpmen: That stipulation does not cover the question as to the cause of death. I don't know whether Mr. [126] Adams is going to bring out any evidence on that.

The Court: What difference would that make?

Mr. Velpmen: It might be that while they were pulling him out of the water, they might claim that the decedent got on another boat, and did something

(Testimony of Bertram William Grothe.)

that caused his own death trying to get from the "Sakito Maru" to another boat. There is that possibility.

The Court: Don't get too nervous about these things, because the court is going to see that substantial justice is done here, and the court is going to have control of this case until final judgment.

Mr. Velpmen: Very well, your Honor.

Cross-Examination

Q. By Mr. Black: On the matter of the visibility, Mr. Grothe, at the time you first saw the approaching "Sakito Maru", did I understand your testimony that you believed the visibility, so far as you were concerned, was about a half a mile at that time? A. That's right.

Q. How far would the "Sakito Maru" in your judgment be from the barge at the moment you first saw the "Sakito Maru"?

A. The distance would be very nearly the same, inasmuch as we were roughly in an isosceles triangle—three boats, ours, the "Olympic" and the "Sakito", were in an isosceles [127] triangle, with our boat forming the base, so the distance would be very nearly the same, I would say.

Q. If I understood you correctly, you heard a three blast signal from the "Sakito Maru" very shortly before the collision?

A. You might say at the time of the collision.

Q. That was the first signal, other than the fog signal, that you heard from the Japanese vessel?

(Testimony of Bertram William Grothe.)

A. That's right.

Mr. Adams: Those are all the questions.

Redirect Examination

Q. By Mr. Cluff: When you saw the "Sakito Maru" the first time, about half a mile from you, and evidently about a half a mile from the "Olympic", could you give us an estimate of how much time elapsed from that time up to the collision?

A. Possibly four or five minutes.

Q. Four or five minutes?

A. Yes.

Q. Of that four or five minutes——

The Court: It took her four or five minutes to go a half a mile? A. Yes.

Q. By Mr. Cluff: Of that four or five minutes, how much would you say elapsed before the "Sakito Maru" took [128] her turn to starboard?

A. Well, she probably—let me answer this way: She probably—she gave a swing into starboard within a matter of less than a minute, at the time of the impact.

Q. Less than a minute at the time of the impact?

A. Of the time of the impact.

Q. So that her approach, before that swing to starboard, occupied the great majority of the time she was within your vision? A. Yes.

Q. At the time she made the swing, I think you said she was two or two and a half lengths, of her own length, from the "Olympic"?

(Testimony of Bertram William Grothe.)

A. At the time she made the swing to starboard, yes.

Q. Then I think you also testified that she was about a length away when the bell started to ring continuously on the "Olympic", and that was about 15 seconds before the impact? A. Yes.

Q. I wonder if you would consider, Mr. Grothe, that if a vessel made her length of 500 feet in 15 seconds, she was going 2,000 feet a minute, or 20 knots an hour? I wonder if you, in the light of that suggestion, want to reconsider that 15-second estimate?

Mr. Adams: I object upon the ground that it is an attempt to impeach his own witness. [129]

Mr. Cluff: I am surprised at the witness's statement.

The Court: You have a right to ask the witness to explain his testimony, if he has any explanation to make.

A. You say in the light of my statement that the bell rang continuously for 15 seconds, while the boat apparently traveled 500 feet, she would be going 20 knots an hour?

Mr. Cluff: Possibly I misunderstood you, but as I compute roughly, if she was a ship's length away, or her own length away from the barge, at the time the bell started ringing rapidly and continuously, if it rang continuously up to the time of the collision, and the interval was 15 seconds, it follows, doesn't it, that the ship moved a distance of 500

(Testimony of Bertram William Grothe.)

feet through the water in 15 seconds?

A. It follows, if you assume my judgment is infallible.

Q. Then, if you take 500 feet in 15 seconds, or 2,000 feet a minute, by rough computation, that is 20 knots an hour?

A. That doesn't sound very good.

Q. I wonder if you wouldn't like to overhaul this estimate a little bit?

A. In explanation, possibly my 15-minute is a great deal longer——

Q. 15-second estimate, you mean?

A. And my ship's length may be shorter; that is, there may be, instead of 550, there may be 500 feet, and the length of time may be 10 seconds, rather than 15.

Mr. Adams: If the court please—— [130]

The Court: I think as a matter of fairness these terms of distance are your estimates?

A. To the best of my judgment.

Q. To the best of your judgment, but, as you said before, you may be off on these seconds?

A. That's true; they are estimates, I will admit; I did not have a stop watch.

Mr. Cluff: You have been, you say, and are more or less familiar, as you say, with the speed of a vessel, and in forming an estimate, whether right or wrong, of that speed, you have given us your best recollection, your best estimates?

A. That's right.

(Testimony of Bertram William Grothe.)

Q. By the Court: How long was the boat in traveling a half a mile, from the time it first came into your vision until the time of the collision?

A. Possibly four minutes.

The Court: That would make it traveling a mile every eight minutes?

A. A mile every eight minutes, yes.

Mr. Cluff: That would be, roughly, $7\frac{1}{2}$ knots?

A. A knot being a little greater than a mile.

Q. 6080 feet to the knot, is generally figured 6 knots to the mile.

The Court: I am thankful you haven't got down to speaking of meters yet. Are there any further questions [131] of this witness, gentlemen?

Mr. Cluff: I haven't quite finished.

Q. You spoke of distinctive signals of the bells of the three barges. Are you able to state what those distinctive signals were?

A. The main action of the bell was identical in all three barges; in other words, the approximate length of time that the bell rang continuously was done in the same style, if you get what I mean.

Q. That is, the regular conventional 5-seconds peal?

A. That's right, but at the end of the 5-seconds continuous ringing—I may be mistaken as to the identity of these, but the “Rainbow” gave one clang; the “Olympic” two, and the “Point Loma” none. It may be the other way around; it may be that the “Loma” gave two, but there was a distinctive quality in each ring of the three barges.

(Testimony of Bertram William Grothe.)

Q. There was either no supplemental ring, or a supplemental ring from one barge, and two supplemental rings from the other?

A. That is what I am trying to say, yes.

Mr. Cluff: I think that is all.

Recross Examination

Q. By Mr. Adams: Did you notice, after you came to anchor there, and the fog set in, that the fog lay in a layer or strata, and that the area between the water, and so many feet above the surface of the water was less dense [132] than the atmosphere above that particular stratification?

A. No, I can't say that I noticed any such condition.

Mr. Adams: No further questions.

(Short recess.)

No. 10190

IN THE
United States
Circuit Court of Appeals²
For the Ninth Circuit

STERLING CARR, as Trustee in Bankruptcy
of NIPPON YUSEN KABUSHIKI KAISYA,
a Corporation, Bankrupt, and FIDEL-
ITY AND DEPOSIT COMPANY OF MARY-
LAND, a Corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD.,
a Corporation, and J. M. ANDERSEN,
Appellees.
(And Fourteen Consolidated Appeals.)

APPELLANTS' OPENING BRIEF

FILED

OCT 16 1942

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CLERK

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No. 10190

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

STERLING CARR, as Trustee in Bankruptcy
of NIPPON YUSEN KABUSHIKI KAISYA,
a Corporation, Bankrupt, and FIDEL-
ITY AND DEPOSIT COMPANY OF MARY-
LAND, a Corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD.,
a Corporation, and J. M. ANDERSEN,
Appellees.

(And Fourteen Consolidated Appeals.)

APPELLANTS' OPENING BRIEF

STATEMENT OF FACTS.

A. Preliminary—San Pedro Bay.

San Pedro Bay is an arc-like indentation in the coast line of Southern California. For the purpose of determining the territorial limits of California, the chord of this arc has been judicially determined to be a line drawn from Point Fermin, its northwest extremity, to Point La-

suen, distant some sixteen miles to the southeast. The portion of the shore line formerly known as Point Lasuen is the present site of the city of Huntington Beach.

United States v. Carrillo (1935), 13 F. Supp. 121 (S.D.Cal.);

People v. Stralla (1939), 14 Cal.(2d) 617, 621, 91 Pac.(2d) 941.

In the northwesterly segment of these waters, lying landward from the line between Point Fermin and Point Lasuen, there have been constructed the facilities of Los Angeles harbor, consisting, so far as of interest herein, of a western breakwater, a harbor entrance, and an easterly breakwater extension. It is classic learning that, in its natural state, the Bay of San Pedro in the vicinity of the present harbor afforded little protection to the mariner. Thus, writing of times more than a century ago in

Two Years Before the Mast—Everyman's Edition, pages 78, 79,

Richard Henry Dana said of this locality:

“Leaving Santa Barbara, we coasted along down, the country appearing level or moderately uneven, and, for the most part, sandy and treeless; until doubling a high sandy point, we let go our anchor at a distance of three or three and a-half miles from shore. It was like a vessel bound to St. John's, Newfoundland, coming to anchor on the Grand Banks; for the shore being low appeared to be at a greater distance than it actually was, and we thought we might as well have stayed at Santa Barbara, and sent our boat down for the hides. * * * No sooner had we come to anchor, than the slip rope,

and the other preparations for southeasters, were got ready; and there was reason enough for it, for we lay exposed to every wind that could blow, except the northerly winds, and they came over a flat country with a rake of more than a league of water."

The tide in the affairs of this locality which was destined to convert a portion of San Pedro Bay into one of the commercially practicable, busiest and most important harbors of the Pacific, commenced to run long before the turn of the century, for the same writer, in

Twenty-four Years After (id. p. 321),

dealing with conditions in 1859, wrote:

"The next morning, we found ourselves at anchor in the Bay of San Pedro. Here was this hated, this thoroughly detested spot. Although we lay near, I could scarcely recognize the hill up which we rolled and dragged and pushed and carried our heavy loads, and down which we pitched the hides, to carry them barefooted over the rocks to the floating long-boat. It was no longer the landing place. One had been made at the head of the creek, and boats discharged and took off cargoes from a mole or wharf, in a quiet place, safe from the southeasters. A tug ran to take off passengers from the steamer to the wharf—for the trade of Los Angeles is sufficient to support such a vessel."

In these exposed waters a little seaward of the line defining San Pedro Bay, after daylight on the morning of September 4, 1940, the fishing barge *Olympic II* lay some three miles in a direction approximately $159\frac{1}{2}^{\circ}$ true from Los Angeles lighthouse, which is located at the eastern

end of the westerly breakwater marking the harbor entrance. She was there run into, in a fog, and sunk by the appellant's motorship Sakito Maru. Seven or eight lives were lost, personal injuries claimed, and there was also considerable property damage and loss. In the ensuing litigation before the District Court from which this appeal is taken, the Sakito Maru was held solely at fault with damages to be ascertained.

B. The Two Vessels.

The Olympic II was a former sailing ship, built of iron at Belfast, Ireland, in 1877, and converted a few years before the collision here involved into a fishing barge. (Ap. I, pp. 349, 350) Prior to her conversion, she had been known as the Star of France. (Ap. I, p. 372) She was operated commercially by her owners and catered to fishermen who boarded her from shore boats in order to enjoy the fishing. (Ap. I, pp. 407, 408) The vessel was of an over-all length of 279.5 feet, and her beam was 38 feet. Her gross tonnage was 1776, and her net tonnage was 1414. As she lay on the date of the collision, her draft aft was 16.6, and forward 15 feet. (Ap. I, pp. 372-375; Ap. II, p. 740) The vessel was in charge of a "crew" of three men: Ohiser, the night watchman; Greenwood, the shipkeeper; and Culp, the bait boy. Ohiser was certificated as an ordinary seaman the two others so far as appears, held no licenses or certificates. (Ap. I, p. 354) Her open hold was ballasted by 1500 tons of sand and a half dozen concrete blocks of a total weight of about 10 tons. (Ap. I, p. 364)

In order to hold her in a fixed position headed into the prevailing westerly swell, at the time the Olympic II was placed in these waters on May 8, 1940, a 6,000 pound bow anchor on a $2\frac{1}{4}$ -inch chain was put forward to the west, and a 1200 pound stern anchor on a $1\frac{1}{4}$ -inch chain was placed aft to the east. The length of chain out forward was 630 feet, and the length of chain out aft was at least 300 feet. The after anchor was marked by a mooring buoy which rode above it. (Ap. I, pp. 355, 382, 383) The vessel was so headed and held in place to protect her customers from seasickness. As so tied up, the axis of the Olympic II might change about a point from her heading of 270° in either direction. (Ap. I, p. 356) The water where the Olympic II lay was approximately 100 feet deep. (Ap. I, p. 379) Other vessels in the vicinity at the time anchored in normal fashion rode to their anchors with stems headed in a general northerly direction. (Ap. I, p. 417; Ap. II, p. 531) The wind came from the northeast and was of force 1 Beaufort scale, or approximately 7 knots per hour. (Ap. II, p. 824) It was stipulated at the trial that it is very frequently foggy in the vicinity of Los Angeles harbor. (Ap. I, p. 411)

Into the hull of this iron vessel of over 60 years of age was built one forward or collision bulkhead located 20 feet abaft her stem. The remainder of her hold, to her stern, was open. (Ap. I, p. 362) She was enrolled and licensed as a barge in 1934 to carry on the coasting trade, and her last consolidated certificate had been taken up over a year before the collision for her failure to have a load line. (Ap. I, pp. 371-374; Ap. II, p. 741) Demands in June of 1940, presented to her owners by the local

inspectors that she comply with certain standards relating, among others, to increased bulkheading of the hull, to the maintenance of a sufficient crew properly officered, and to other safety standards, were met by the objection that the vessel could not operate as a business proposition if such requirements were observed. (Ap. I, pp. 390-400; id. 403) The requirements of the local inspectors were affirmed on appeal. (Ap. II, pp. 744, 745) Such ruling was made more than a month before the accident, but the Olympic II did nothing. When the steel stem of the Sakito Maru, little more than a year and one-half off the ways, struck the ancient iron plates comprising the port ribs of the Olympic II, at a near right angle about amidships, the latter went down with a rapidity approaching that of the ice-stoven Linseed King.¹ With passengers crowding her rail to board the small boat, H-10, the Olympic sank, carrying them with her, in about three and a half minutes. (Ap. III, p. 1138)

A few hundred feet northerly of the Olympic II, and about in line with her position and inshore of her, lay the Point Loma, another fishing barge similarly tied up. About in line with the Point Loma, and a few hundred yards easterly of her, lay the barge Rainbow, or Samar, similarly headed and engaged in the same calling. (Ap. I, p. 359; Ap. III, p. 987)

The general locality of the barges is known locally as "Horseshoe Kelp" and as a place where fish are found, but it is not shown on any official chart of these waters,

(1) (1932) 285 U.S. 502, 52 S.Ct. 450, 76 L.ed. 903.

nor is its presence noted in the Coast Pilot. (Ap. III, p. 1001) The Olympic II's owners took no steps to advise mariners of her location and did not notify the hydrographic office. (Ap. I, pp. 412, 413) "Horseshoe Kelp" is an ill-defined area in the shape of a horseshoe covering perhaps a square mile, and is frequented by fishing vessels. (Ap. I, p. 445; Ap. III, p. 1394) It lies dangerously close to the courses of vessels bound south from Los Angeles harbor, and into Los Angeles harbor from southern ports. (Ap. III, p. 1050; id. pp. 1024-1027; id. p. 1327)

On the morning of September 4, 1940, the Japanese motorship Sakito Maru was inbound to Los Angeles harbor for bunkering. She had come via the Panama Canal from New York and was bound for Yokohama. (Ap. II, p. 805) She was a large cargo vessel then displacing approximately 10,000 tons. (Ap. III, p. 1408) Her length overall was 506.76 feet, and between perpendiculars 465.6 feet. Her breadth was 62.32 feet, and her tonnage 7,126.32 gross and 3900.09 net. (Ap. II, pp. 803, 804) Her bridge was approximately 213 feet aft of her stem, and was some 53 feet above the water. (Ap. II, p. 807) Her forecastle head was 33-34 feet above the water. (Ap. III, p. 1141) She was drawing 27 feet aft and 24 feet 7 inches forward. (Ap. III, pp. 1086, 1087) She was launched in the fall of 1938, and entered upon her first voyage in January, 1939. (Ap. II, p. 803) She was equipped with two 4800 horsepower Diesel engines connected directly to the shafts, and her propellers were twin screws turning outward when she was moving ahead. (Ap. II, p. 807)

C. Circumstances of the Collision.

At daylight on September 4, 1940, the Sakito Maru had been steering course 340° true, as shown by her gyro course recorder, for some hours. This course had been first taken off Benitos Island on September 3d, the position of the vessel checked off Coronado Island, and again checked by several bearings on Santa Catalina Island taken between 5:20 and 6:08 a.m. of September 4th. (Ap. II, pp. 809, 813) The latter bearings showed a departure of about a mile and a quarter from the theoretical position on her navigating chart, and her position was corrected thereon, but her course was not changed. (Ap. II, p. 808; Ap. III, pp. 1189, 1190)

Had the theoretical course from 5:58 a.m. been made good, the Sakito Maru would have passed to the westerly of the Olympic II, but between that time and the time of collision at 7:10½, she had been set over easterly a distance in the neighborhood of one-half mile. (Ap. III, pp. 1188, 9)

At 7:03 a.m. on the morning of the collision, Captain Sato, of the Sakito Maru, who, with her chief officer, an apprentice officer and a quartermaster, were on the bridge, ordered her engines slow ahead and fog signals sounded. (Ap. II, p. 826; Ap. III, pp. 1105, 6) Within three minutes, or by 7:06 a.m., the speed of the vessel was thereby reduced from 16 knots to from $6\frac{1}{4}$ to $6\frac{1}{2}$ knots, and her engine revolutions from approximately 118 to 50 revolutions. (Ap. II, pp. 838; id. p. 929) At the time fog signals were sounded, an A.B. sailor went on lookout on the fore-castle head, and just before 7:09 he megaphoned the

presence of a vessel dead ahead. (Ap. II, p. 833; Ap. III, p. 1109) The engines of the vessel were rung stop and immediately thereafter full astern. (Ap. II, p. 826; Ap. III, pp. 1113, 4) Simultaneously her helm was put hard to starboard (Ap. II, p. 841) The Olympic was probably sighted about 200 meters, or something in excess of 200 yards, ahead of the stem of the Sakito Maru, and at the time she was hit, the Sakito's speed was probably one to one and one-quarter knots. (Ap. III, p. 1113; id. p. 1125) The time of the collision is fixed at 7:10½ a.m., and at that time the Sakito had just commenced to alter course to starboard in answer to the helm action taken at 7:09. (Ap. III, p. 1118) All maneuvers of the Sakito Maru were entered in the rough or scrap log as they were made by the apprentice officer. (Ap. III, pp. 1288-90) The time of the collision was logged by the half minute in the smooth log because the apprentice officer had looked at the clock, and the captain, in view of the importance of the time, instructed him to enter it at 7:10½ rather than follow the usual practice. (Ap. III, p. 1126)

No bell from the Olympic II was heard by the lookout (Ap. II, p. 947) or the navigating officers of the Sakito Maru until just before the collision and after they had already sighted her. (Ap. II, p. 842; Ap. III, p. 1114) At the time the bell was heard, it was ringing continuously. (Ap. III, p. 1114)

Each of the fourteen witnesses presented by libelants was examined in court. Five of respondent's witnesses were so examined, and of these only one, Captain Sato, was aboard the Sakito Maru. Her chief engineer, first

officer and lookout testified by deposition, as did three Coast Guard officers. In addition, six brief statements of other Sakito Maru witnesses were received in evidence. Counsel for libelants stipulated that the witnesses would so testify if present in court, and, on the basis of such stipulation, a motion of respondent for a continuance to secure depositions was denied. The developing international situation in mid-September, 1941, when the case was tried, had defeated respondent's expectations that such witnesses' depositions could be presented to the trial court. (Ap. I, pp. 92-96)

The foregoing statement is designed to give the court a brief resume of what we consider to be the main facts testified to at the trial and the circumstances of the parties and their witnesses. Questions of visibility, signals sounded, and the propriety of the maneuvers of the Sakito Maru are so contentious that we have endeavored to make the foregoing statement sufficiently general to escape criticism. Upon the entire evidence, the trial court, ruling that the Olympic II was not violating any statute and that she was not subject to inspection and regulation by the inspectors, held the Sakito Maru in sole fault for this disaster, and we now detail the reasons why we believe such decree should be either reversed in its entirety or modified to one of mutual fault.

D. Questions Involved.

The findings of the trial court convict the Sakito Maru of immoderate speed in fog and for inefficient lookout. The Olympic II was absolved of all blame asserted to be incident to her location and seaworthiness. She was

found to have sounded proper fog signals. It was further adjudged that, notwithstanding her exposed location and character of employment, she was not a sea-going barge and hence not subject to the inspection laws of the United States. Accordingly, the owners of the Olympic were excused from failure to comply with the requirements of such statutes and of the inspectors. It was held that the Sakito Maru, even though she did not see the Olympic in time to avoid her, had, nevertheless, the last clear chance so that even if faults existed on the part of the Olympic, they would have been excused. The principal questions involved on this appeal as shown by the Assignments of Error (Ap. I, pp. 249-55) arise out of the foregoing determinations of the court below.

E. Jurisdiction.

The jurisdiction of this Court arises and exists under Article III, Sec. 2 of the Constitution and Sections 128 and 129 of the Judicial Code. (28 U.S.C.A. §§ 225-227) Jurisdiction in the District Court existed under the above constitutional provision and under Section 24 of the Judicial Code. (28 U.S.C.A., Sec. 41 (3) (Ap. I, p. 13)

F. Assigned Errors Relied Upon.

Herein appellant relies upon Assignments of Error III to XXVII, inclusive. (Ap. I, pp. 249-55)

ARGUMENT.

I. THE QUESTION OF VISIBILITY.

The trial court found that the Olympic was clearly visible to a person standing at the bow of the Sakito for a distance of at least 1800 feet. This finding is made the basis of Assignment of Error XXIV. (Ap. I, p. 254)² The evidence on this question is so confused and conflicting that in our opening statement we contented ourselves with the assertion that the collision occurred in a fog. As the determination of this question is particularly crucial, we believe it appropriate to examine the record at once before turning our attention to the questions of fault.

If Jones be believed, visibility was two miles at the time of the collision. (Ap. II, pp. 498-500) If Ohiser, the night-watchman on the Olympic II, be believed—and he said he had the Sakito Maru under observation for 10 or 20 minutes before the collision (Ap. II, p. 687)—visibility must have been considerably greater, for the collision was at 7:10½ and between 6:50 and 7:03 the Sakito was going 16 knots. Similarly, if Grothe and Walter were able to observe the approaching Sakito Maru from their position on a small fishing vessel some 500 feet off the Olympic's stern, change her course definitely to port and again to starboard before the collision, she must have been seen a great distance away. So, notwithstanding these witnesses all heard fog bells and Grothe and Walter were sounding their own and heard fog whistles from the

(2) "The District Court erred in finding that the Olympic II was clearly visible to a person standing at the bow of the Sakito Maru for at least 1800 feet." (Ap. I, p. 254)

Sakito Maru, there is, if this testimony as to visibility is believed, no case of fog collision here involved, and the precautions universally claimed to have been observed by all parties were a sort of idle exercise. (Grothe, Ap. I, pp. 425, 6; Walter, Ap. II, p. 651)

As opposed to these witnesses, Harris, also a witness for libelant and aboard the Pat with Jones, could only see the Rainbow located perhaps as much as 500 yards easterly of him, because he knew where to look for her when he stopped his vessel a short time before the collision. (Ap. II, p. 527) Jones himself thought visibility was 300 yards when they came out in the Pat fifteen minutes before the collision. (Ap. II, pp. 499, 500) But Liddell, aboard the tug Clark lying some 75 feet off the Point Loma's port bow and probably little, if any, more than 200 yards from the Olympic II, first saw the Sakito when she was about 25 feet from the Olympic II. (Ap. II, p. 769) At the time, he was taking compass bearings on the Sakito's whistle and watching for her. (Ap. II, p. 769) This witness was the only disinterested one produced by either party who was not during the period in question engaged in some other distracting activity, and his judgment of visibility, gauged by the distance he saw the Sakito Maru from the Olympic II, confirms the testimony of her master and chief officer that visibility was about 200 meters. (Ap. II, pp. 867, 886; Ap. III, p. 1113)

Other witnesses testified as to fog conditions. Smith, of the H-10 water taxi lying near the tug Clark off the Point Loma's port bow, testified at the trial that when his attention was called to her, the Sakito was about 600 yards or more from the Olympic. (Ap. II, p. 611) This

more than trebled his estimate given before the A Board a year earlier. (Ap. II, p. 637) Collins, aboard the Point Loma, thought he saw the Sakito across the deck of the Olympic about as far from the Olympic as the Point Loma was from her. The latter distance he estimated at 1000 to 1200 feet (Ap. III, p. 1065) The Coast Guard witness, Lieutenant Hewins, placed the Olympic about half as far from the Point Loma. (Ap. III, p. 987) But Collins confirms Liddell's statement that the latter called Smith's attention to the Sakito. (Ap. III, p. 1072) So Smith, the man who saw the Sakito 600 yards or more from the Olympic, had his attention called to the Sakito by Liddell, who was watching for her to approach on the compass bearings he was taking on her whistle and actually saw her only about 25 feet from the Olympic in the jaws of collision.

No estimates were given by the witnesses Karsh and Johnson, and those of Lieutenants Hewins and Bartlett are remote, as the C. G. C. *Hermes* did not arrive at the scene of the accident until about 8:10 a.m.; but the fact that even at that time visibility was a half mile to a mile, and the *Hermes* at first continued sounding fog signals while searching the wreckage, is not without all significance (Ap. III, p. 964; id. p. 1013) when regard is had to the trial court's finding that, at the time of the collision, the bright sun was breaking through and dissipating the fog. (Ap. I, p. 254, Ass. of Err. XXII)³ Stiles, in

(3) "The District Court erred in finding that at the time of the collision the fog, from the standpoint of those aboard the Sakito Maru, was not very thick and that the bright sun was breaking through and dissipating the fog." (Ap. I, p. 254)

charge of the water taxi Lillian L., which brought fishermen to the Olympic only a short time before the collision, stated that the fog was patchy and that visibility would vary from 300 to 800 yards. (Ap. II, p. 708)

When the testimony of Lieutenant Bartlett (confirmed by Johnson, Ap. II, p. 571) is regarded that visibility from the deck of the *Hermes* was greater than from the bridge, and that the fog lay in layers (Ap. III, pp. 1031, 1032), and the fog's variable nature, as testified to by Stiles (Ap. II, p. 708), is given weight, it appears plain that the case is one of fog collision in which a particularly heavy patch surrounded the Olympic, and where it is not unlikely that persons near the water level might have seen the *Sakito* at a greater distance than persons on the *Sakito's* forecastle head and bridge elevated above the water could see ahead.

Both Captain Sato and Chief Officer Yokota of the *Sakito Maru* admitted that, prior to the time they sighted the Olympic about 200 meters ahead, they considered their range of visibility considerably greater. Sato put it at approximately 300 meters. (Ap. III, p. 1113) Yokota put it at about 500 to 600 meters. (Ap. II, pp. 867, 886)

Acting upon this testimony, the trial court concludes that the *Sakito's* lookout could have seen the Olympic at least 1800 feet away. The trial court appeared to be most strongly influenced by the testimony of libellant's witness Smith and respondent's witness Collins, as well as by the testimony of witnesses on vessels anchored several hundred feet astern of the Olympic, and of Johnson, a fisherman on the Olympic. Testimony of several per-

sons that they had no apprehension of collision when the Sakito was sighted was regarded as highly significant by the trial judge.

As noted, Smith testified in court that the Sakito was 600 yards or more from the Olympic when he first saw her, trebling his estimate of 150 yards to 200 yards given before the inspectors. (Ap. II, p. 611; id. p. 637) Collins and Liddell both testified that the latter called Smith's attention to the Sakito's approach just before the collision, yet Smith places the distance of the Sakito from the Olympic when he first saw her at least 1775 feet farther than Liddell, and 600 feet or more farther than Collins. (Liddell, Ap. II, pp. 768, 769; Collins, Ap. III, pp. 1065, 1072; Smith, Ap. II, p. 613) Collins also estimated that the Sakito pushed the Olympic so that, when she came to rest, she was only half as far from the Point Loma as before. (Ap. III, p. 1076) That would be a near broadside push of 500 to 600 feet. (Ap. III, p. 1065) If the Olympic was only about one-eighth mile from the Point Loma, as testified to by Lieutenant Hewins (Ap. III, p. 987), all of Collins' estimates would have to be cut in half, and if so reduced, would not be so unreasonably out of line with those of the Sakito as not to be accounted for by reasonable error. We do not see how Smith's statements on distance can be accepted at all.

As we pointed out above, the other witnesses saw so many things that morning that no vessel of the Sakito's size could have done within the period they saw her and which her gyro course recorder proves that she did not do, that we feel no credence can be placed in them.

Ohiser, for example, first saw the Sakito's starboard side on a parallel course 10 to 20 minutes before the collision. (Ap. II, pp. 664, 667) That would be a heading 70° or approaching a right angle off the course her recorder shows. The testimony of libelant's witness Stiles as to minimum visibility is not far from that at which the Sakito sighted the Olympic. (Ap. II, p. 708) It is without significance that witnesses who saw the Sakito approaching stem-on, estimated her distance in ship's lengths of which they could not then have had the slightest idea, or that lay witnesses, seeing her 62-foot beam beyond her bows and having no knowledge of the turning circle of vessels, felt no apprehension of danger. Apprehension of danger, or risk of collision is not something that a lay mind is necessarily equipped to appreciate. If it were, it would hardly have been thought necessary to put a preliminary to Article 18 in the International Rules, which reads as follows:

“Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.”

(33 U.S.C.A. Sec. 101.)

How could Grothe, Walter, Jones and Harris, anchored about 500 feet easterly off the Olympic's stern, even if they knew the rule, ascertain with any degree of certainty that no risk of collision existed? Johnson, aboard the Olympic, gave her only casual attention; he was fishing. (Ap. II, p. 556) He took no bearings.

Referring to the court's statement that witnesses of the Sakito, other than Sato and Yokota, could not or would not give estimates of visibility (Ap. I, p. 120), it suffices to say that those in the engine room could not see weather conditions, and Shimada was the only Sakito eye-witness who testified by deposition or orally, other than Sato and Yokota. Shimada was asked how far away he thought the Olympic was, and answered that he did not know. (Ap. II, p. 950; *id.* pp. 952, 953) He was not asked to give his best estimate. The statements which the Sakito Maru offered show that Kanda did not recall the distance (Ap. III, pp. 1288, 1290); that Aono was not in a position to see the Olympic prior to the collision (Ap. III, pp. 1290, 1291); that Namba saw the Olympic only just before the collision and was not on the bridge (Ap. III, pp. 1291, 1292), and Yokoyama made no statement that he ever saw the Olympic, but simply stated he could not estimate visibility during the short interval he stood lookout before he was relieved by Shimada. (Ap. III, pp. 1292, 1293) Possibly more light on these questions might have been developed had the trial court granted the motion for a continuance.

Of the witnesses examined, perhaps only Grothe and Jones can be accused of exhibiting definite hostility to the Japanese vessel. Grothe saw no lifeboat from the Sakito until "at the very least over an hour after the collision," and Jones increased his estimate of when the Sakito lifeboat arrived on the scene from 10 to 20 minutes between the time of the Inspectors' hearing and the trial. (Ap. I, p. 443; Ap. II, pp. 493, 494)

In these circumstances, we submit that the findings of the trial court that the Sakito should have seen the Olympic at least 1800 feet away is clearly erroneous and could only be reached by giving the greater weight to the inherently improbable testimony and the lesser weight to that which is consistent and credible. It should have been found that visibility from the Sakito was about 200 meters. (Ap. I, p. 254, Ass. of Err. XXIV)

II. THE QUESTION OF FOG SIGNALS.

A. Factual Questions.

Nearly all of the witnesses testified to hearing one or more signals on the Sakito's fog whistle. But for that, their attention would not have been directed to her approach, and on this branch of the case, all roads lead to Rome. The Sakito's officers and crew above deck all heard the whistles sounded regularly at proper intervals after 7:03 a.m.

The problem of the Olympic's signals is both factually and legally more perplexing. The failure of the trial court to find that the Olympic failed to sound proper signals is the meat of Assignment of Error XII. (Ap. I, p. 252)⁴ There is a mass of testimony from witnesses on neighboring small boats, and of one witness on the Point Loma, that they heard the barges, including the Olympic, ringing their bells regularly at proper intervals until just before the collision, when the Olympic rang contin-

(4) "The District Court erred in not finding that the Olympic II failed to sound proper fog signals." (Ap. I, p. 252)

nously for a period, the length of which is uncertain. In viewing this testimony, it is of utmost importance to note that not one of the witnesses testified that the bell was actually rung at or near 7:03 and regularly at intervals a minute later, up to the time it was sounded continuously. In other words, this testimony is too general and too vague to be of much value; for, having heard the bells ring in rotation for about 15 seconds, a lull of 45 seconds, and another series of peals over a period of some minutes, the fact of having heard the bells so sounded would carry over in the witnesses' consciousness a period of quiescence. Libelant's witness Walter put this psychological fact in words of great simplicity when he said: "You hear these things, and being out there so many times, you kind of expect them." This comes pretty close to stating that the testimony of these witnesses is rather to be regarded as negative than positive testimony. In effect, they state they heard the bells of the barges rung in rotation and were not, at any time, conscious of any interruptions in their peals.

The lack of weight of such general testimony is emphasized by the fact that Ohiser, the man who rang the bell, though he had been on duty since 4 p.m. on the day before, stated that there were a couple of intervals between 6:30 and the collision when the bells of the barges stopped ringing "for just about a few minutes." He could not fix the time because he did not look at his watch. Whether this was during the critical period after 7 a.m., he could not say. (Ap. II, pp. 683-5) While this very bell was used to announce time aboard ship (Ap. I, p. 353), the witness

had no notion as to whether he might have stopped ringing it "for just about a few minutes" after 7:05, when the approach of the Sakito made it particularly vital to give the signal. As Ohiser was the man best able to know the truth about this matter, and as he cannot testify positively that the bell was rung at regular intervals during the period before the collision and directly contradicts witnesses who state that the bells of all the barges rang at regular intervals continuously after 6:30 or 6:45, or some other time, we respectfully submit:

1. Under the actor rule, the testimony of Ohiser that he stopped ringing for two intervals of a few minutes after 6:30 and before 7:10 should be accepted.
2. That the negative testimony of the deck officers and men on the Sakito Maru that the bell was not heard before they saw the Olympic II should be accepted as proof that such bell was not rung for the few minutes before 7:09 when it might have been within the range of their hearing.

The trial court's statement (Ap. I, p. 127) that "the only conflict raised" in regard to the Olympic's fog signals comes from the Sakito Maru "that no signals were heard" ignores the testimony of Ohiser himself, the man who gave the signals—if they were given. It credits general testimony of witnesses whose attention could not be, or was not, directed to a single instant of time, and states such testimony is "overwhelming." It is overwhelming in numbers of witnesses only; its weight is negligible when regard is had to the facts of this case

and the situation of other vessels ringing bells in that area. Particularly is this true when the man charged with the duty cannot say positively that it was performed at the critical period, and those on the colliding vessel did not hear the bells.

B. Legal Questions.

As the Olympic II, Point Loma and Rainbow lay as purprestures across the courses of vessels southbound from and northbound to Los Angeles, they occupied fixed positions. (Ap. III, p. 974) They were not lying at anchor, and were not on the headings upon which an experienced navigator would expect to find them under the conditions of wind then prevailing. They were heading west instead of northerly, as did the anchored Pat and Marell, which were riding to anchors.

The Olympic and the other barges were, we believe, technically moored or tied up in fixed positions. Counsel for a libelant referred to them as "parked" (Ap. III, p. 1024), and while non-technical, it is very descriptive of the situation. They had converted a portion of the sea lane to Los Angeles harbor into a private anchorage ground. The degree of obstruction they presented would be measurable by their overall lengths and by the pitch of their stern and bow anchor chains when brought into relation with the 100-foot depth of the water and the draft of an approaching vessel. The Olympic had over 600 feet of chain out forward and at least 300 feet (possibly 200 yards, Ap. III, p. 1017) out aft. It has frequently been held under the provision of the Inland Rules, corresponding to Article 15 (d) of the International

Rules and bearing the same number, that a moored vessel is a *casus omissus* in the rules and should take steps necessary in fog to make her presence known to navigating vessels. Thus, in

Pennsylvania R. Co. v. Central R. R. of N. J., (1939)
(C.C.A.2) 103 F.(2d) 428, 429; cert. denied 308
U.S. 591,

“We have repeatedly held that when two or more fog-bound vessels are moored abreast outside a pier-end, they must sound some warning. This neither the statute, nor the rules require: It is judge-made law, and possibly it is ill-made law. But at least there is this to be said for it; that the position of those of the vessels which are moored outside that which is next the pier-end, is for all practical purposes the same as though they were anchored in the channel. Certainly when six, seven, or even ten, as is sometimes the case, are so moored, the analogy is very close indeed. It is of course true that such vessels are not anchored, and for that reason Art. 15(a) (d), Inland Rules, 33 U.S.C.A. § 191 (a) (d) does not apply to them; but there is surely a good reason to require some warning from them; and we are not disposed to abate the requirement in such situations.”

See:

The Youngstown (1930), 40 F. (2d) 420 (C.C.A.2):

“The reason of the rule is that, in such a position, vessels to be excused at all, *must make themselves known*, either by sight or sound.”*

*Emphasis throughout this brief supplied.

A strong decision in point is that of Circuit Justice Lacombe in

The Kennebec (1901), 108 F. 300 (C.C.A.2).

As she lay tied up on September 4, 1940, we believe that the Olympic was no less a floating plant than the dredge involved in

Petition of Red Star Towing etc. Co. (1929) 30 F. (2d) 454 (C.C.A.2); affg. 30 F. (2d) 452; cert. denied 279 U.S. 844,

and the drill boat in

The Marian (1935), 66 F. (2d) 354 (C.C.A.9); cert. den. 290 U.S. 687.

She was not technically an anchored vessel. While some of the foregoing authorities and others to the same general effect indicate that such a vessel may sound the bell of a vessel at anchor by analogy, the real legal test is not whether she sounded a bell, but whether she gave notice by sound appropriate to her position in accordance with the practice of good seamanship.

Where contention was made that a vessel at anchor in fog should have moored with bow and stern anchor, it was rejected by District Judge Rose in

The City of Richmond (1920) (D.C.Md.), 265 F. 722, 725,

the court saying:

“The Texan argues that it is so rare for merchant vessels to make themselves fast in the manner suggested that an unexpected resort to it in thick

weather would increase rather than diminish danger to other craft. When a ship's lights are made out, the natural presumption, in view of the almost universal practice, is that the ship is heading to wind and tide. If, in a particular instance, this assumption turns out to be wrong, a collision may well result."

We submit that, even if this court should determine that the Olympic II did sound her bell at the critical period, in her situation such warning was not adequate to her unusual position, involving as it did an obstruction of unusual length lying upon an axis almost exactly perpendicular to what an approaching steam vessel would expect. When it is further considered that there was no evidence to show that the Olympic II was prepared to take any other step to protect herself and other vessels, such as casting off one anchor and paying out or moving up on her chain to the other, the case is all the more flagrant. See

The Baltimore (1922), 283 F. 728 (C.C.A.1);

The West Cherow (1921), 276 F. 585 (E.D. Va.)

The above discussion has not considered the possible application of Article IX(i), 33 U.S.C.A. Section 79 (i) to the Olympic. That section provides, so far as material here:

"In fog, mist, falling snow or heavy rainstorms
* * * vessels line fishing with their lines out, shall, if of twenty tons gross tonnage or upward, respectively, at intervals of not more than one minute make a blast; if steam vessels, with the whistle or siren,

and if sailing vessels, with the fog horn, each blast to be followed by ringing the bell.”

Subdivision (h) of the same Article of the International Rules requires such a vessel, when it becomes stationary in consequence of its gear getting fast to a rock or other obstruction, to comply with Article 15(d); i. e., sound her fog bell. The Olympic appears not to be within subdivision (h), for at the time of this collision she was tied up with her lines out (Ap. II, pp. 556-8), and if within subdivision (i) *supra*, should have both sounded her whistle and rung her bell. The other situations in which fishing vessels are required to take this precaution provided for in subdivision (i) would indicate that its purpose is to require whistle and bell when a fishing vessel presents in a fog an obstruction greater than that which her hull alone would present. It applies also to “drift-net vessels attached to their nets, and vessels when trawling, dredging, or fishing with any kind of drag net”. Here the record shows that Johnson had some 200 yards of line out increasing by so much the obstacle which the Olympic presented to an approaching vessel. (Ap. II, pp. 556-8) Exaction of a signal more apt to cause notice and to convey more precise information where the nature of the obstruction is unusual would, therefore, seem the purpose of the rule, and, so construed, the Olympic is within it and guilty of clear statutory fault.

So far as we can determine, the above section of the Rules of the Road has not received judicial construction, but Marsden remarks:

“The fog signals required to be made by fishing vessels are prescribed by Article 9 (i).” (9th Ed. (1934) p. 338)

In any view, we consider that the Olympic II, 3.3 miles off the breakwater and harbor entrance, did not use care appropriate to her position directly athwart the “steamer lanes” into and out of Los Angeles harbor. See

The Silverpalm (1937), 94 F.(2d) 754 (C.C.A.9).

III. THE OLYMPIC II WAS DELIBERATELY TIED UP AND MAINTAINED IN A KNOWN STEAMER LANE IN VIOLATION OF STATUTE AND CONTRARY TO GOOD SEAMANSHIP.

There can be little question concerning the actual position of the Olympic at the time of the collision. Lieutenant Hewins, commander of the U. S. Coast Guard Cutter *Hermes*, took sextant observations on six points while on a barge which was moored over the wreck. According to these observations, the wreck was 3.3 nautical miles in a direction $159\frac{1}{2}$ degrees true from the lighthouse at the end of the San Pedro breakwater. The observations of Lieutenant Hewins were adopted by the United States Army Engineers in fixing the location of the wreck, and this position is the one shown for the wreck on the latest issues of Charts Nos. 5101 and 5143 of the U. S. Coast and Geodetic Survey. (Ap. III, pp. 970, 971; Sakito's Exhibits P and Q)

The only difference between the position of the wreck as fixed by Hewins and the position of the Olympic at

the time of the collision is the distance the Olympic moved from her fixed position as a result of the impact. Hewins testified that the wreck was within 150 to 200 feet from the prior position of the Olympic. (Ap. III, pp. 1014, 15) This coincides with the estimates of various witnesses as to the distance that the Olympic traveled following the collision and until she sank. (Ap. I, p. 467; Ap. II, p. 616) (300 ft. Ap. II, p. 722)

There were no recent bearings taken on the positions of the three barges and the record indicates that they were continually having trouble with their anchors. (Ap. III, p. 1070; id. pp. 1369-75) Hewins placed the Point Loma $\frac{1}{8}$ mile from the Olympic in a northerly direction, and the Rainbow or Samar $\frac{1}{3}$ mile from the Olympic in an easterly direction. (Ap. III, p. 987) There is a good deal of conflict on the point, but in any view the barges with their anchor chains presented at the very least an obstruction to navigation extending a half mile directly across the steamer lanes 3 to 3.3 miles off the harbor entrance.⁵ There is not the slightest question but that vessels bound north and south frequently passed close aboard the barges easterly and westerly of them. This statement could be supported by references to the Apostles too legion to undertake.

(5) Assignment of Error VI: "The District Court erred in not finding that the Olympic II was at fault for anchoring and remaining in the position and location in which she was at the time of the collision under the conditions then existing."

Id. VII: "The District Court erred in not finding that the Olympic II, at the time of and prior to the collision, was anchored and maintained in a dangerous position so as to constitute a menace to navigation and that such fault was a cause of the collision." (Ap. I, p. 251)

The courses 340° true northbound and $160 - 162^{\circ}$ true southbound steered by vessels to and from Los Angeles harbor (Ap. III, p. 974; id. p. 1303) are, of course, simply headings, and whether a vessel will be brought up on such heading at a point $159\frac{1}{2}^{\circ}$ true off the lighthouse will depend to some extent on her point of departure and upon vicissitudes of tide, wind, necessity to navigate for other vessels, and other circumstances. (Ap. III, p. 992) Suffice it to say that vessels' courses might intersect or come very close to the position of any of the barges, and on September 4, 1940, the course of 340° true steered by the Sakito Maru carried her directly into the side of the Olympic II.

Captain Arthur and Lieutenant Hewins explained these matters in some detail in their testimony. (Ap. III, pp. 1025-7; id. pp. 1297-1303) Captain Arthur also pointed out that the projection of a course of 340° true, leading directly to the center of the entrance way to Los Angeles harbor, would be distant only 400 yards from the position of the wreck of the Olympic. (Ap. III, pp. 1304, 5)

Despite the position of the Olympic, the Hermosa Amusement Corporation, Ltd., never requested any notice to be issued to mariners by the Hydrographic Office concerning the location of the Olympic. (Ap. I, p. 412) Lieutenant Hewins testified that he never saw any written information issued to mariners concerning the location of the Olympic and the other barges, and no such information was contained in the Coast Pilot. (Ap. III, p. 1001)

To be added to the foregoing facts is the further important one that the Olympic was actually warned in

May or June of 1940 by the United States Coast Guard Service that the barge was anchored in a very dangerous place. Similar warnings were given at the same time to the Point Loma and to the Rainbow by Ensign Shoemaker and Mr. Moynahan. (Ap. III, pp. 1050, 1052)

It seems to us that the facts previously discussed would establish to the satisfaction of everyone that the positions of these barges, including the Olympic, were a serious menace to navigation and an ever present danger, not only to the safety of the persons and property aboard such barges, but to all vessels required to enter and leave Los Angeles harbor in the directions mentioned. Three practical navigators, Captain Arthur, Captain Sato and Mr. Moynahan, were asked their opinions on this question, and their testimony is undisputed that the position of the Olympic was a danger to the safety of herself, persons and property on board, and to all vessels approaching and leaving Los Angeles harbor on the courses previously mentioned. Mr. Moynahan, a warrant officer of the United States Coast Guard Service of 20 years' experience at sea and with 16 years' service with the Coast Guard, testified that the position of the Olympic was dangerously close to the established steamer lanes. (Ap. III, pp. 1047, 50, 53) Captain Arthur testified that in his opinion it was not good seamanship to anchor the Olympic in such a position; that anchored in such a position she was in a dangerous place with respect to the safety of herself, the persons and property aboard, and other vessels approaching and leaving Los Angeles harbor, and that she was a menace to navigation with respect to such other

vessels. (Ap. III, pp. 1309, 1327) The matter is simply but eloquently described by the spontaneous answer given by Captain Sato to a question asked by counsel for the Olympic on cross-examination. He was asked by counsel whether he had ever consulted with his First Officer as to whether or not there were any fishing spots in the vicinity of Los Angeles harbor:

“A. I never did consult with him. I never thought that in a harbor as busy as Los Angeles, where ships were going in back and forth, that there would be any fishing barge close to the harbor.” (Ap. III, p. 1217)

Suppose such a barge were tied up 100 yards directly outside or to seaward of the entrance way to the harbor and were maintained in that position for a period of four months. We submit that it would require little to establish to the satisfaction of even the uninitiated that such was an improper and a dangerous place to lie. Move the position of the barge and her chains one mile to seaward from the entrance way in the path of incoming and outgoing vessels. Again little should be required to demonstrate the danger of the position. Move the barge to the position in which she was, 3.3 miles from the entrance way, and place her and her chains broadside to traffic: The danger of her position to incoming and outgoing vessels is lessened only a matter of a few degrees as compared with the positions previously mentioned. Add the factor that the barge is in line with two other barges strung across this path of traffic for several hundred yards and throw in a dense fog which

conceals her and the other two barges from all approaching vessels, and you have as good a recipe as is contained in any admiralty decision for a first-class collision. We submit that, apart from statute, the place in which the Olympic was maintained was an act of negligence on the part of her owners, and that she was a maritime nuisance. (Ass. of Err. VI, Ap. I, p. 251)

Section 409 of Title 33, U. S. Code, makes it unlawful "to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft," and this statute has received judicial construction which, we submit, renders it applicable here.⁶ Thus, the court states in

Eastern Transp. Co. v. United States (1928) 29 F. (2d) 588, 590-591 (E.D.Va.) aff'd 40 F.(2d) 27 (C.C.A.4):

"As generally understood, a channel is a depression, either natural or artificial, below the permanent banks over which the waters flow. * * * As used in paragraph 15 of the statute (33 U.S.C. 409), it must be considered in connection with the language in paragraph 19, which extends its terms to any 'river, lake, harbor, sound, bay, canal, or other navigable

(6) Assignment of Errors VIII; "The District Court erred in finding that at the time of the collision the Olympic II was not anchored in the vicinity of any channel or fairway and in not finding that at such time she was anchored in a navigable channel within the meaning of Section 409 of Title 33 of the United States Code."

Id. IX: "The District Court erred in finding that the Secretary of War had sufficient authority to prohibit the anchorage of the Olympic II at her place of anchorage and that there was a presumption that her place of anchorage was safe and proper because the Secretary of War had not prohibited the same." (Ap. I, pp. 251-2)

waters of the United States' (33 U.S.C. 414), and, if this be true, the act would apply to the open waters of Block Island Sound, and this, I think, is the correct construction to be placed upon its language. I am not advised of any case in which the precise question has arisen, but I think the conclusion consonant with the purpose Congress had in view in enacting the statute. Judge Hughes, in this court, in the case of *The Oliver*, 22 Fed. 849, defined the term 'channel' as referring sometimes to the current of a running stream, but said: 'In tidewaters the term refers to the movement of vessels, and means that part of the water on which vessels move.' That the point at which the Snug Harbor sank was in this sense a frequented channelway is abundantly shown in the evidence, for it is uncontradicted that the great majority of north and southbound coastwise vessels going to and returning from Rhode Island and Massachusetts ports steer a course to take them over or close to the point of the wreck."

The Lehigh (1935), 12 Fed. Supp. 75, 81 (W.D.N.Y.):

"The collision happened in the course regularly followed by upbound vessels navigating between Buffalo and Lake Erie ports and Detroit, Mich., and, thus, within a navigable channel within the meaning of Sections 15 and 19 of chapter 425 of the Act of March 3, 1899 (33 U.S.C.A. 409, 414)."

The extenuating circumstances of anchoring in the lanes of commerce or loitering therein in fog while in the course of a voyage have been held insufficient excuse.

The Persian (1909), 181 F. 439 (C.C.A.2);

The Admiral Schley (1904), 131 F. 433, 436 (C.C.A. 1).

In the first cited case, the collision occurred in the open sea five miles off the Massachusetts coast. Here the Olympic II has not the excuse of a lost and fog-bound vessel, uncertain of her course and anchoring for safety. She had usurped a portion of the navigable waters 3.3 miles from a narrow harbor entrance and held a fixed position there for nearly four months prior to the collision. The general area between Santa Catalina Island and the mainland where this collision occurred is known as San Pedro Channel. (Ap. III, p. 1164) We submit that the Olympic II was tied up in a channel and that her fault in that regard was gross and a violation of statute as well as negligence. (Ass. of Err. VIII, Ap. I, p. 251)

The trial court appears to lay stress upon the point that the Secretary of War has not acted pursuant to the apparent authority conferred by Section 1 of Title 33, U.S.C.A., to prevent the Olympic from occupying the place she did, and states:

“It is reasonable to assume that if the Secretary of War considered the place of anchorage of the Olympic dangerous to navigation, he would have acted.” (Ap. I, pp. 129, 130)

We submit that assuming the power existed in the Secretary of War to take action, his inaction has no bearing upon the question whether the Olympic was anchored or tied up negligently or in violation of Section 409 of the same title. Even if it had been shown that the Secretary of War had notice of the presence of such barges, and it was not, his judgment thereon would be merely executive opinion.

IV. SINCE THE OLYMPIC II WAS NEGLIGENTLY OR UNLAWFULLY TIED UP, SHE WAS AT FAULT. SINCE SHE DID NOT, UNDER THE CONDITIONS OF FOG PREVAILING AT THE TIME, GIVE NOTICE OF HER PRESENCE BY SOUND TO THE APPROACHING SAKITO MARU, SHE WAS SOLELY RESPONSIBLE FOR THE COLLISION.

We have endeavored to demonstrate in subdivision III hereof that the Olympic was unlawfully and imprudently tied up. We believe the record references made in subdivision I establish that the Sakito was competently officered and could not have discovered the Olympic any sooner than she did.⁷ Captain Sato placed this distance at about 200 meters from the Sakito's stem. (Ap. III, p. 1233) Chief Officer Yokota placed it as 200 meters from the bridge. (Ap. II, p. 893) Both testified that prior to the collision they thought their visibility was considerably greater. (Sato, Ap. III, pp. 1113, 1276, 300 meters) (Yokota, Ap. II, pp. 867, 886, 7, about 500-600 meters) At her speed of slow ahead, which did not exceed $6\frac{1}{2}$ knots, the Sakito could have been brought to a stop within the limits at which her officers estimated they could see. (Ap. III, p. 1140) She would not answer her helm properly at a speed of less than 5 knots. (Ap. III, p. 1243)

(7) Assignment of Errors IV: "The District Court erred in not finding that the Olympic II was at fault for said collision."

Id. V: "The District Court erred in not rendering judgment in favor of Nippon Yusen Kabushiki Kaisya and against Hermosa Amusement Corporation, Ltd., on the libel and cross-libel in the above-entitled cause and on the petition under the 56th Admiralty Rule in the above entitled and consolidated causes." (Ap. I, pp. 250-251)

We consider the Sakito Maru was not in fault (a) because Articles 15 and 16 of the International Rules dealing with speed in fog and sound signals are *pari materia* and should be construed together, and (b) the mistake of the officers of the Sakito as to the extent of visibility was, under the variable conditions of fog which they had had under observation only six minutes before the Olympic was sighted, excusable.

The decision in

La Bourgogne (1898), 86 F. 475 (C.C.A.2) cert. denied 172 U.S. 646,

where the anchored Ailsa was mortally wounded and sank after being cut into some 16 feet by the larger and moving *La Bourgogne* seeking anchorage in a fog with visibility of one to two ship lengths, is closely in point even as to the size of the vessels. There the Ailsa's place of anchorage was faulty and her fog bells were not heard by the *La Bourgogne* moving two to four knots through the water and four to six knots over the ground seeking anchorage. The libels of the Ailsa's owners and underwriters, and of an injured passenger, were dismissed by the district court and its action affirmed on appeal. Immediately on sighting the Ailsa, the *La Bourgogne* had ported her wheel and reversed, but these steps had been insufficient to change her heading or to check her speed sufficiently to avoid the Ailsa.

Relative to speed, the size of the wound made in the Ailsa, and the latter's failure to pay out chain, the remarks of Judge Addison Brown in the District Court are partic-

ularly instructive here. His opinion is reported in 76 Fed. 868, and he said:

“She was going to the anchorage ground of Gravesend Bay, the most spacious, the most convenient, and the most usual anchorage ground for vessels outward bound; and if she was not in fault for seeking that anchorage her speed of 2 to 4 knots through the water, kept up by occasional turns of the engine with frequent stops, was not only moderate, but evidently as slow as was compatible with any proper handling of so large a ship. The collision was nearly head and head. Yet the impact of collision was not violent, but comparatively gentle. There was no shock; no breaking of anchor, chain, or windlass; though the Ailsa, held fast by her anchor, received the Bourgoigne’s stem with the whole weight of 5,000 tons of ship and cargo, behind it. Nevertheless the wound extended but 6 feet inboard, and 16 feet on the line of the Ailsa’s keel; and the Bourgoigne, all the time backing her engines went immediately clear without any entanglement. From these circumstances, in connection with the direct evidence, I have no doubt that a speed of 2 knots by the Bourgoigne was abundantly sufficient to cause such a wound as the Ailsa exhibits; that the way of the Bourgoigne through the water was therefore substantially stopped at collision, as her officers testify; and that her impact was scarcely more than by the drift of the tideway; so that if chain had been given, the collision would have been avoided.

“There can be no question that a good lookout was kept up on the Bourgoigne; that the Ailsa was seen and reported as soon as she could be seen; that the Bourgoigne at once reversed, and as I judge stopped her way through the water before collision, from

a previous speed of not more than 3 or 4 knots. This she would do on reversal in going from about 350 to 500 feet, including the tide (*The Normandie*, 43 Fed. 161); and this, according to the evidence, is about the distance she was away when the Ailsa was discovered. The Bourgoigne's account is credible and probable, and I do not find any fault proved in these respects."

The above decision is followed and approved in

The Benjamin A. Van Brunt (1899), 98 Fed. 131 (C.C.A.1).

Likewise, in

The Kennebec (1901), 108 Fed. 300 (C.C.A.2),

in a forceful opinion by Circuit Justice Lacombe, the libel of a barge owner for collision damage sustained by a stationary barge when run into by the Kennebec in motion was dismissed. Gauged by the distance at which the steamer saw the barge, visibility was about 50 feet. The steamer could have been stopped in about 125 feet. The court also points out that even if the steamer had seen the barge moored as she was in clear weather, her master had a right to assume she would not be left there in fog. It was held that the barge should have sounded signals to advise the steamer of her position when conditions were such that she could not be made out by sight.

Referring to the so-called "rule of sight," Judge Knox states in

The Kungsholm, 1938 A.M.C. 1334, 1342 (S.D.N.Y.):

"The rule is not to be applied where the presence of the other vessel was not made known as required

by law to the moving vessel. *La Bourgogne*, 86 Fed. 475, cert. denied, 172 U.S. 646; *Kennebec*, 108 Fed. 300; *Erie Transportation Company v. City of Chicago*, 178 Fed. 42, cert. denied 216 U.S. 620."

And in

The Georgia (1913), 208 F. 635, 645 (D.C.R.I.),
the court likewise points out that:

"Safety in a fog is not sufficiently provided for by relying solely upon the reduction of speed of the moving vessel."

We submit that in this case, if the signals of the *Olympic* had been properly sounded, they would have been heard by the *Sakito Maru* forward of her beam within time for her to have stopped and sufficiently taken off her way to have avoided this collision. We submit further that, in navigating his vessel, Captain Sato had a right to assume that he would not encounter vessels violating the rule of sounding signals in fog. If the rule of sight is to be applied in a case of this nature, the reasoning of the foregoing authorities must be rejected here and the rule be laid down as a universal one that any vessel maintaining proper lookout, but colliding in a fog with any object, is, as matter of law, in fault and must confess fault in any litigation because in all such cases she cannot stop within the limits of her visibility. We do not think the better reasoned cases lay down any such inflexible principle or fix unquestioned fault as the price of movement in fog regardless of the conduct or situation of the vessel or structure collided with. (Ass. of Err. IV and V, Ap. I, pp. 250, 51)

This leads us to the next question, which is whether Captain Sato and his chief officer were in fault for their inaccurate estimate of visibility.⁸ This is material because the testimony is that their vessel could have been stopped within the distance they thought they could see. We have already noted that the fog was patchy and variable and that visibility at water level would exceed that on the elevated forecastle head and bridge of the *Sakito Maru*. The navigating officers had only six minutes after encountering these conditions within which to appraise the situation. For the first three minutes of this time, the speed of their vessel was decelerating. (Ap. II, pp. 826, 7; Ap. III, p. 1107) The question is not whether a mistake was made; the mistake is admitted. The question is whether a careful and prudent navigator might have made it.

The Old Reliable (1921), 269 F. 725, 728 (C.C.A.3):

“No man is infallible, and there are certain errors of judgment for which the law does not hold a person liable; but he is liable for an error of judgment which a careful and prudent navigator would not have made. *The W. E. Gladwish*, 17 Blatchf. 77, 83. Fed Cas. No. 17,355.”

The A. P. Skidmore (1902), 115 F. 791 (C.C.A.2):

“In this case, the question is whether at the time and under the circumstances reasonable prudence was observed. In a case like the present, the court should

(8) Assignment of Errors XVIII: “The District Court erred in finding that the Japanese Motor Vessel *Sakito Maru* was proceeding at an immoderate speed at the time of and prior to the collision.” (Ap. I, p. 253)

put itself in the position of the master at the time, and, unless it is satisfied that he did not exercise the discretion consistent with sound judgment, should refuse to condemn his mistake as a fault.”

The matter of moderate speed is left to the discretion of the navigator, and we submit that, if he is alert and on the bridge, hindsight should not be indulged in to inculcate his vessel. As to the first point, in

Lie v. San Francisco & P. S. Co., 243 U.S. 291,
37 S. Ct. 270, 61 L. ed. 726, 732,

referring to Article 16 of the International Rules, the court says:

“The most cursory reader of this rule must see that while the first paragraph of it gives to the navigator discretion as to what shall be ‘moderate speed’ in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him.”

We conclude that the evidence discloses no negligence of the navigators of the *Sakito Maru* and that, in the absence of fault, she should not have been held liable for any loss incident to this collision. Under the circumstances disclosed, the finding of immoderate speed was unjustified. (Ass. of Err. XVIII, Ap. I, p. 253)

V. THE OLYMPIC'S LOOKOUT WAS NOT SUFFICIENT.

While in the situation in which the *Olympic II* was maintained on September 4, 1940, there was nothing

beyond giving proper signals and more vigorously employing them when danger approached that a proper lookout might have done, nevertheless the lookout on the *Olympic* was so defective that, in any view of the law and the circumstances, we think that this additional fault is properly attributable to her. (Ass. of Err. X, Ap. I, p. 252)⁹

We have already noted that the duties of Ohiser had commenced at 4 p.m. on the preceding day. (Ap. II, p. 676) He usually slept during the daytime, but, on the morning in question, stood by to help out Greenwood, the shipkeeper, and Culp, the bait boy. Little more than a recapitulation of this man's testimony is sufficient to demonstrate his lack of competence. During all of the material times involved, he alone was entrusted with the protection of the lives and property on board the barge as she lay tied up, directly in the steamer lanes, during the foggy weather which prevailed. In fact, he was not really on duty. His duties were over at 6 o'clock, but he testified that he told the boys on the day crew that he "would stay and give them a little hand." (Ap. II, pp. 703-5) While he was supposedly standing lookout and attending to the ringing of the bell, he went in the restaurant around 6:30 and ate breakfast. (Ap. II, p. 661) We submit that one can search the reported decisions of our admiralty courts in vain to find a more complete and non-chalant disregard of the duties of a lookout.

(9) "The District Court erred in not finding that the lookout on the *Olympic II* was grossly inattentive and incompetent, failed to sound proper fog signals and neglected to take other precautionary steps required in the practice of good seamanship and by the attendant circumstances, and that these faults contributed to the collision."

He testified that he saw the Sakito 10 to 20 minutes before the impact. (Ap. II, p. 687) At that time he said that the Sakito was about 5 or 6 ship-lengths distant from the Olympic. (Ap. II, pp. 689, 690) Before he sighted the Sakito, he testified that he heard some kind of a noise that he thought might have been the propellers. (Ap. II, pp. 692, 693) This man's testimony is so replete with contradictions and inconsistencies as to distances and sounds that it should be rejected on those subjects. He is consistent only in the statement that he stopped ringing the bell on two occasions.

When he first saw the Sakito, it seemed to him that she was heading in the same direction as the barge on an absolutely parallel course. (Ap. II, pp. 664, 665) We respectfully request the court to examine the diagram drawn by Ohiser, which is Olympic's Exhibit No. 7. (Ap. II, p. 666) We also respectfully request the court to refer to the diagram drawn by Ohiser at the time his testimony was given before the "A" Board on September 6, 1940. This was introduced in evidence as Sakito's Exhibit D. (Ap. II, p. 696)

The requirement of a lookout having undivided duties is universally recognized:

The Ariadne (1872), 80 U.S. 475, 478, 20 L. Ed. 542;
The Knoxville City (1940), 112 F. (2d) 223, 226
 (C.C.A. 9);
The Koyei Maru (1938), 96 F. (2d) 652, 654
 (C.C.A. 9).

Ohiser's duties were not undivided, and a more detailed analysis of his testimony concerning his ringing the bell

aboard the Olympic is as follows: Between 6:30 and 7 o'clock it was foggy off and on, and he could see, off and on, the side of the Rainbow. (Ap. II, p. 689) He only rang the Olympic's bell when he heard the bells of the other barges preceding it. He did not on his own initiative ring the Olympic's bell when the other barges were not ringing their bells. (Ap. II, p. 680) There were times when the Rainbow sounded its bell, but he did not sound the Olympic's bell, and at those times the fog was "kind of light" toward the shoreline or the breakwater. (Ap. II, pp. 680, 681) The fog was intermittent and varied between 6:30 and 7:10 a.m. (Ap. II, pp. 679, 680, 683) Sometimes it would lighten up. On a couple of occasions when the fog lightened up, the barges discontinued ringing their bells. He did not look at his watch to determine whether these occasions were near 7 o'clock or how long the barges discontinued ringing the bells. (Ap. II, pp. 683, 684) He didn't look at his watch to determine whether it was 7 or 7:05 or 6:55 or 7:07. (Ap. II, pp. 683-5) Again, answering questions propounded by the court, he testified:

"Q. You say that this Sakito was in your vision from 10 to 20 minutes?

A. Something like that.

Q. But what I am trying to ascertain is whether any time there, whether it was 10 minutes or 20 minutes, did you at any time during that period let up ringing your bell at intervals?

A. I wasn't sure exactly. I think I did. My mind was practically set on that ship, whether she was going to turn right or going beyond us." (Ap. II, p. 688)

While the fundamental fault lay with the general unpreparedness of the Olympic to remove herself or to take steps in avoidance of anticipable dangers in fog, we believe that if the Olympic had had a proper lookout and a proper signal man at her bell it is probable that her presence would have been made known to the Sakito Maru in time to stop her engines and ascertain the Olympic's position. In this connection, it is not without significance that Ohiser testified that Greenwood came up just before the collision and told him to ring the bell hard, and actually took hold of the bell rope at the same time and helped Ohiser. (Ap. II, p. 704) If Ohiser had been doing a proper job before, it seems unlikely that Greenwood would have felt himself obliged to give instruction and physical assistance in ringing a fourteen-inch bell.

In his discussion of Article 29 of the International Rules, which is known as the Rule of Precaution, La Boyteaux, in his work

The Rules of the Road at Sea,

says at page 230:

“Sudden emergencies may at times require a vessel to anchor where she ought not to anchor under normal conditions. In such cases, the vessel being anchored perhaps in a fair-way or other improper berth, extraordinary precautions adequate to such position should be taken for the benefit of approaching vessels. Moreover, the vessel should be removed as soon as conditions permit.”

We submit that the Olympic's lookout was inefficient under any accepted authority, and woefully inefficient contemplating her self-established helpless condition.

VI. THE OLYMPIC WAS UNSEAWORTHY AS TO MANNING AND CONSTRUCTION, AND SUCH CONDITIONS CONTRIBUTED TO THE COLLISION OR TO THE LOSSES.

A. The Olympic Was Incompetently and Inadequately Manned.

The Olympic was a seagoing barge and was incompetently and inadequately manned because it failed to comply with statutory requirements of certificated personnel. Captain Anderson made no effort to learn if any of the three crew members on board at the time of the collision were certificated (Ap. I, p. 386) No showing is made that Greenwood or Culp had any certificate, and Ohiser was an ordinary seaman, a rating less than able seaman. (Ass. of Err. XIII, Ap. I, p. 252)¹⁰

The statutory requirements are:

“No vessel of 100 tons gross and upward, except those navigating rivers exclusively and the smaller inland lakes and except as provided in Section 569 of this Title, shall be permitted to depart from any port of the United States unless she has on board a crew not less than 75 percentum of which, in each department thereof, are able to understand any order given by the officers of such vessel, nor unless 65 percentum of her deck crew, exclusive of licensed officers and apprentices, are of a rating not less than able seamen. * * *”

(46 U.S.C. § 672, subd. (a))

“The provisions of Section 672 of this Title, (as amended) requiring the manning of certain merchant vessels by persons holding certificates of service or

(10) “The District Court erred in not finding that the Olympic II was incompetently and inadequately manned and that this fault contributed to the resultant loss of life, personal injuries and property damages.”

efficiency issued by the Bureau of Marine Inspection and Navigation, shall not apply as to unrigged vessels, *except seagoing barges * * *.*”

(46 U.S.C. § 672b)

“When used in Section 643a, 660b and 672b—

“(1) The term ‘unrigged vessel’ means any vessel that is not self-propelled.

“(2) The term ‘seagoing barge’ means any barge which from its design and construction may be reasonably expected to encounter and ride out the ordinary perils of the seas and which, in fact, in the usual course of its operations passes outside the line dividing inland waters from the high seas, as defined in Section 151 of Title 33, as amended.”

(46 U.S.C. § 672c)

The exception of Section 569 referred to in section 672, subd. (a), *supra*, is not pertinent here. The Olympic was a vessel of more than 100 gross tons. She was not used in navigating rivers or small inland lakes. By design and construction, she was reasonably expected to ride out the ordinary perils of the sea, and did, in fact, in the usual course of operations, do so. The requirements of Section 672 that she have certificated personnel therefore applied to her, as she was a seagoing barge and was operated as such in exposed waters.

The Secretary of Commerce is authorized (33 U.S.C. § 151) to designate and define the lines dividing the high seas from rivers, harbors and inland waters. Pursuant to this statute, the line separating the high seas from inland waters at San Pedro Bay has been designated as follows:

“A line drawn from Los Angeles Harbor lighthouse through the axis of the new breakwater and extended in a straight line to the port of Long Beach.”

Pilot Rules for certain inland waters of the Atlantic and Pacific Coasts and of the Coast of the Gulf of Mexico, edition of May 28, 1940.

The Olympic operated at “Horseshoe Kelp,” some distance outside this line, and was violating the statute at the moment of collision.

The definition enacted by the Congress in 46 U.S.C. § 672c was drawn from an opinion of the Supreme Court of Massachusetts in

Commonwealth v. Breakwater Co., 214 Mass. 10, 16, 100 N.E. 1034,

where the state sought to enforce a boiler-inspection law on a rock barge used in the construction of a breakwater. The court there held that if the barge was sea-going, it would be within the exclusive jurisdiction of the United States and not subject to the regulations of Massachusetts law, saying:

“The point of difficulty is whether it was ‘sea-going.’ No exact definition of this word has been given. In this connection, we think it means a barge, which from its design and construction with fair reason, in the light of all the history of ocean-going vessels, may be expected to encounter and ride out the ordinary perils of the sea, and which in fact does go to sea. If a vessel is not designed upon such a plan or constructed of such materials or with such skill as to warrant a reasonable belief that she is

staunch enough to venture upon the high seas, the mere fact that by selecting smoother waters and fair weather she is able on occasion to go there without mishap would not warrant the description of sea-going. But want of means of self-propulsion is not a conclusive test. She may still be sea-going if she is adapted to go by tow, and does so go upon the high seas."

The Olympic was 258 feet long, 38 feet wide, with a net tonnage of 1766 tons. She had served on the high seas for many years after being launched in Belfast, Ireland, in 1877, and, since her conversion into a fishing barge, had remained during the fishing season at her moorings in an exposed position on the high seas off Los Angeles harbor regardless of weather conditions.

B. The Olympic Was Unseaworthy Because She Failed to Comply With the Requirements Imposed By the Inspection Service.¹¹

The applicable statutes are:

"* * * The local inspectors shall, once in every year, at least, carefully inspect the hull of each sail

(11) Assignment of Errors XV: "The District Court erred in finding that the minimum requirements specified for the Olympic II by the U. S. Local Inspectors of the Bureau of Marine Inspection and Navigation were not enforced and that the owners of the Olympic II were not obliged to comply with such minimum requirements prior to the time of the collision."

Id. XVI: "The District Court erred in finding that said minimum requirements imposed by the U. S. Local Inspectors of the Bureau of Marine Inspection and Navigation were a nullity and that they were without power or authority to impose the same."

Id. XVII: "The District Court erred in finding that the Olympic II was not a seagoing barge within the meaning or contemplation of Section 395 of Title 46 of the United States Code." (Ap. I, p. 253)

vessel of over seven hundred tons carrying passengers for hire and all other vessels and barges of over one hundred tons burden carrying passengers for hire within their respective districts, and shall satisfy themselves that every such vessel so submitted to their inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in condition to warrant the belief that she may be used in navigation with safety to life. * * *."

(46 U.S.C. § 391)

"The local inspectors of steamboats shall at least once in every year inspect the hull and equipment of every seagoing barge of one hundred gross tons or over, and shall satisfy themselves that such barge is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in a condition to warrant the belief that she may be used in navigation with safety to life. * * *"

(46 U.S.C. § 395)

The Olympic is as clearly a seagoing barge within these statutes as within 46 U.S.C. § 672, et seq., supra. A large dredge in Los Angeles harbor has been held a seagoing barge within the meaning of the inspection statutes.

City of Los Angeles v. United Dredging Co. (1926),
14 F. (2d) 364 (C.C.A. 9)

Moreover, the Olympic was within the definition of

"all other vessels and barges of over one hundred tons burden carrying passengers for hire"

of 46 U.S.C. 391, supra, and thereby also required to be inspected.

It will be noted that under the foregoing statutes the local inspectors

*“shall satisfy themselves that such barge is of a structure suitable for the service in which she is to be employed, * * * and is in a condition to warrant the belief that she may be used in navigation with safety to life.”*

In the exercise of this judgment, the local inspectors at Los Angeles determined upon certain requirements

“which in the opinion of this Board must be complied with in order that non-self-propelled pleasure vessels may be suitable and safe for the purposes in which they are employed.”

They advised the master of the Olympic of these requirements. (Letter, June 3, 1940, Sakito Exhibit B, Ap. I, pp. 390, 391)

At the time of the collision, the Olympic had no inspection certificate. The requirement that the Olympic have

*“a sufficient number of transverse watertight bulkheads * * * fitted so that the vessel will remain afloat with positive stability in the event any one main compartment is flooded”*

was not complied with. (Ap. II, pp. 747-749) The operation of the Olympic without the certificate required by the statute and without meeting the safety requirements of the local inspectors which were prerequisites for the issuance of such a certificate, was a violation of statute. The Olympic, in addition, did not meet the requirement

(Ap. I, p. 401) that she have a licensed master and a licensed engineer on board while persons other than the crew were on the ship.

“If any such barge shall be navigated without such certificate of inspection * * * the owner shall be liable to a penalty of \$500 for each offense.”

(46 U.S.C. 398.)

Navigation, of course, means use within the service to which the vessel is devoted. The word is to be construed broadly to effectuate the purposes of the statute, namely, to promote the safety of human lives upon the ocean.

United States v. Steam Tug Union, (S.D.N.Y.) 1932
A.M.C. 1331, 1336:

“In my judgment the purpose of the Act of 1908 is plain on its face—it is to insure safety in navigation. * * * When this was the object, what is meant by ‘navigation’? In my judgment, it covers the time when the tug was engaged in business. A man is engaged in the business of selling goods though he may not be selling anything at the moment; a man is engaged in the business of digging holes though he may at the moment be taking a drink or changing tools.”

The above case held that the crew requirements of the local inspectors applied from the time the vessel’s crew stood by in the morning until they quit work at night, and was not limited to the period of movement of the vessel through the water.

The purpose of the statute requiring inspection of sea-going barges and the purpose of the local inspectors in formulating minimum safety requirements were to safe-

guard the lives of those on board such vessels at sea, regardless of whether the vessels were in motion. Certainly the passengers on the Olympic were in as great a danger consequent upon non-compliance with the safety requirements while the vessel was tied up as they would have been had they been on board when she was towed to her location.

“The term ‘navigation’ includes the control during the voyage of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas. It includes the time and the manner of leaving port, equally with the course of sailing and the sail to be carried. For some purposes it includes a period when a ship is not in motion, as for instance when she is at anchor.” (45 C.J., p. 576)

These faults of the Olympic were inexcusable, and no attempt was made on the part of counsel for Hermosa to carry the burden of showing that they could not have contributed to the collision and loss.

The Denali (1940), 112 F.(2d) 952 (C.C.A. 9).

Application of this rule to the present case means that the Olympic must show, not that failure to have at least 65 percent of her deck crew of a rating not less than able seamen and the failure to have “a sufficient number of transverse water-tight bulkheads * * * so that the vessel will remain afloat with positive stability in the event any one main compartment is flooded”, and the failure to have licensed officers aboard, might not have contributed to the disaster, but that they *could not* have done so.

The testimony offered upon this point by libelant was that of Captain Wilver, who stated:

“* * * I believe that, in the first place, if you strike a vessel that hard—I am still going to insist on hitting that is a hard blow, 23 feet—the decks would fall down. That would be the first thing would happen; and the whole structure of the vessel would collapse and render those bulkheads asunder.” (Ap. III, p. 1355)

Actually, on the Olympic without even the added strength bulkheads would have given her, nothing of the kind happened. The decks did not fall down. The whole structure did not collapse. Johnson, who was holding the rail a few feet from the point of impact, noticed no shock; (Ap. II, p. 562) he picked up his fishing tackle, walked around the nose of the Sakito Maru and over to the water taxi. (Ap. II, pp. 563-7) He just walked normally across the deck. (Ap. II, p. 563) Greenwood walked across the deck to the bow of the Sakito Maru. (Ap. II, p. 589) Ohiser walked from one side of the Olympic to the other. (Ap. II, p. 670) None of the witnesses who were aboard the Olympic following the impact reported any collapse of the deck or of “the whole structure of the vessel.”

In connection with the Olympic's unseaworthiness with regard to bulkheads, it should be remembered that negligence which causes or contributes to the *loss*, although not to the collision, is nevertheless a fault. In a limitation proceeding where the sinking of a vessel was due to negligence in taking her out among floating ice, the court stated:

“There was another act of negligence, contributory, no doubt, to the loss sustained, namely the large number of passengers who were permitted to board the boat and enter the cabin. * * * While over-crowding was not the proximate cause of the disaster, it nevertheless was contributory to the drowning of at least some of the men in the cabin, for no one will doubt that if the boat had not been over-crowded, quite a number, how many of course is uncertain, would not have gone down with the foundered boat. It was a concurrent cause, and the owner, in my opinion, was not absolved from liability, even though not responsible for other causes.”

The Linseed King (1928), 24 F.(2d) 967, 972, 973; affd. 52 F.(2d) 129, and modified on other grounds, 285 U.S. 502, 76 L.ed. 903, 52 S.Ct. 450.

Admiralty texts and authorities clearly establish the rule that the condition of a vessel may be such as to be either the sole proximate cause of the loss she sustains as a result of the negligence of another or so contributory to her damage or loss as to involve her in mutual fault and necessitate a division of the damages to herself and others. Thus, in

Wallace v. Johnson (1913), 204 F. 440 (C.C.A.5) it is stated:

“The conclusion from the evidence is irresistible that the age and condition of the schooner greatly increased the extent and cost of repairs. It is clear that the force of the collision could not have been responsible for the collapse of her decks. * * *

“We are firmly of the conviction that no such damage would have resulted to the *Jordan*, had she

been strong and staunch, and her owners must be held to some responsibility for the exposed position of the pilot boat."

Roscoe Admiralty Jurisdiction and Practice (5th ed.) p. 81:

"If a collision is occasioned by the fault of one vessel, it is not material in point of law which vessel strikes the other in the first instance, nor does mere impact give a cause of action unless damage results; *and if the object collided with in the course of navigation is not of proper strength to withstand ordinary pressure, the vessel doing the damage may escape liability.*"

Marsden, Collisions at Sea (9th ed.) p. 24:

"When the negligence is an immediate cause of the loss, it is material in an action to recover damages for that loss, although it is in no way a cause of the collision in which the loss occurred."

Not only did the Olympic fail to meet the burden of proving that her statutory faults *could not* have contributed to the collision and the loss, but she has failed even to prove that they probably did not so contribute. In fact, the preponderance of the evidence points inescapably to the conclusion that the fault of the Olympic in not having a competent and adequate crew of certified seamen was a contributing cause to the collision, and her failure to have proper bulkheads, required alike by the inspectors under statutory authority and by ordinary good seamanship, directly contributed to the consequent loss of life and property.

VII. THE NAVIGATION OF THE SAKITO MARU WAS IN ALL RESPECTS IN ACCORDANCE WITH THE RULES AND THE PRINCIPLES OF GOOD SEAMANSHIP.

A. Watch and Lookout.

There is not the slightest question that from 7 a. m., on until the collision, Captain Sato, Chief Officer Yokota, Apprentice Officer Kanda and Quartermaster Aono were continuously on the bridge. (Ap. II, p. 808; Ap. III, p. 1091; Ap. III, pp. 1288-90; Ap. III, p. 1290, 1291) Both the captain and the chief officer were keeping a lookout ahead, and the apprentice officer when not attending to other duties such as making time observations and entries in the scrap or memo log, was also keeping a lookout ahead. (Ap. II, 836, 837; Ap. III, pp. 1106-8, 1288-90)

At the time the fog signals started, apprentice sailor Yokoyama was engaged in cleaning the forecastle head. (Ap. II, pp. 838, 839; Ap. III, pp. 1292, 1293; id p. 1109) He stopped this work and acted as lookout until he was relieved by the A. B. sailor Shimada. (Ap. III, pp. 1292, 1293) At 7:09, Shimada megaphoned the presence of a vessel ahead to the bridge, and her loom was immediately picked up by the captain and the chief officer. (Ap. II, p. 839; Ap. III, p. 1113) Against the testimony of those who saw Shimada there and who acted upon his megaphoned warning is a mass of negative testimony of fishermen in small boats and other witnesses that they saw no lookout. If this testimony outweighs that of the Sakito Maru, it would be necessary to decide that each man on the deck of the Sakito Maru committed deliberate perjury. The District Court, who heard the lay witnesses and

only Captain Sato of the Japanese vessel, declined to find that no lookout was maintained. (Ap. I, p. 124)

The trial court did, however, in virtue of his determination that visibility was at least 1800 feet, find that the Sakito's lookout was inefficient. Error is assigned as follows:

“The District Court erred in finding that the lookout aboard the Japanese Motor Vessel Sakito Maru was inefficient or in fault in any respect.” (Ass. of Err. XXIII, Ap. I, p. 254)

This contrary finding must necessarily fall if visibility is determined to be approximately 200 meters. The lookout himself testified that after taking his position and relieving Yokoyama a little after 7:03, he looked on both sides and ahead until he saw the Olympic. (Ap. II, p. 947)

B. Fog Signals.

We have already pointed out above that the only reason why the attention of nearly every witness was called to the approach of the Sakito Maru was the sound of her fog whistle. The testimony of the Sakito is that such whistle was being sounded in blasts of proper duration at intervals to comply with the rules. (Ap. II, p. 819; id. pp. 837, 838; Ap. III, pp. 1105, 1106) It is no more surprising that some witnesses may have heard only one or two whistles than that they should have missed the two occasions of “just about a few minutes” when Ohiser testified the barges did not ring their bells.

C. The Sakito Maru Was Proceeding at a Speed Which, in the Discretion of Her Master, Having Regard to the Conditions He Observed, Seemed Moderate.¹²

We have already noted the decision in *The Beaver* and *The Selja* for the proposition that the portion of Article 16 dealing with speed in fog is a direction calling for use of discretion;

Lie v. San Francisco & S. Co. (1917), 243 U.S. 291,
37 S. Ct. 279, 61 L. ed. 726;

and the decisions in

The Old Reliable, 269 F. 725 (C.C.A.3); and
The A. P. Skidmore, 115 F. 791 (C.C.A.2),

that the test of care is the action taken under the conditions observed which call for its exercise.

The district court concluded that the speed of the Sakito Maru approaching the Olympic exceeded considerably the speed of 6 - 6½ knots testified to by her master, confirmed by her engine room records, but disputed by argumentative calculations and estimates of witnesses. Accordingly, we shall deal with that problem here. (Ass. of Err. XVIII, XXI, Ap. I, pp. 253, 4)

(12) This matter already received some attention in subdivision IV hereof. The applicable Assignments of Error are: "XVIII. The District Court erred in finding that the Japanese Motor Vessel Sakito Maru was proceeding at an immoderate speed at the time of and prior to the collision." (Ap. I, p. 253) "XX. The District Court erred in finding that at 7:09 o'clock A.M. the Sakito Maru was proceeding at not less than 8 miles per hour and in not finding that at this time the Sakito Maru was proceeding at not more than 6½ knots per hour." (Ap. I, pp. 253-4) "XXI. The District Court erred in finding that at 7:03 o'clock A.M. the Sakito Maru was 9120 feet distant from the Olympic." (Ap. I, p. 254)

Since 7:06, and at the time the Olympic was sighted at 7:09, Captain Sato testified that the speed of the Sakito, as the engines were set slow ahead, was $6\frac{1}{4}$ - $6\frac{1}{2}$ miles per hour. (Ap. III, p. 1107) Chief Officer Yokota testified that the speed of the vessel during this period was 6 to $6\frac{1}{2}$ miles per hour. (Ap. II, p. 838) These estimates of speed were given by the master and the chief officer of the Sakito, both of whom were highly competent and qualified mariners of many years experience. (Ap. II, p. 803; Ap. III, p. 1085) They are the ones most familiar and conversant with the characteristics of their own vessel, including her speed. They testified to the immediate response they got on all orders to the engine room and the physical manipulations required to place the engines slow ahead and to reverse them were explained in detail by Chief Engineer Kato. (Ap. II, p. 841; pp. 915-29; Ap. III, pp. 1286, 1287; id. pp. 1293, 1294) There is nothing in this testimony to create even a vagrant notion that the Sakito Maru was, on September 4, 1940, an ill-manned, equipped or navigated vessel, or that any of her officers or crew was not alert or attentive to his duties.

A man of practical experience as a mariner knows that it is difficult and practically impossible to estimate the speed of an approaching vessel. Mr. Collins, who is the master of a salvage tug and who is engaged in the salvage and general towing business, has spent most of his time, since he first acquired a boat of his own in 1906, on the waters of Los Angeles harbor. He holds both an operator's and a pilot's license for San Pedro and Long

Beach. He testified that he did not think anyone could tell what the speed of the Sakito was by simply looking at the bow of the vessel as she approached. (Ap. III, pp. 1064, 1065)

As we have seen, before the Olympic was sighted by the Sakito, Captain Sato believed that visibility extended for about 300 meters. Chief Officer Yokota was of the opinion that at this time visibility extended for 500 to 600 meters.

Captain Sato testified that, loaded as the Sakito was at that time, and proceeding with her engines at slow ahead as they were at the time, and with the vessel making a speed of $6\frac{1}{4}$ to $6\frac{1}{2}$ knots per hour, as she was at that time, the Sakito could be brought to a complete stop by putting the engines full astern within 250-300 meters, or $1\frac{1}{2}$ to 2 of her lengths. (Ap. III, p. 1140; id. p. 1243) Chief Officer Yokota estimated that under these conditions the Sakito could be brought to a complete stop by putting her engines full astern within a distance of 300 meters. (Ap. II, p. 908) This evidence by Captain Sato and Chief Officer Yokota, who certainly are the most qualified to speak with reference to the subject, is uncontradicted.

Article 16 of the International Rules provides, in part, as follows:

“Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. * * *”

(33 U.S.C. § 92)

While off-hand it might appear that a vessel which collides with a fixed structure has twice the distance within which to avoid a collision as that which would be in her grasp in case of a moving vessel approaching her end on, this is by no means a demonstration that in fog a vessel colliding with a fixed structure is at fault. It must be borne in mind that in the case of two moving vessels, the avoidance of collision in such situation is a partnership proposition. Each can take proper steps on sighting the other when the steering and sailing rules begin to apply. In approaching a breakwater or a fixed object like the Olympic and her chains spread out upon an unnatural heading across her course, the Sakito had to play a lone hand. The length of the obstruction was great; it was not headed into the wind, but was upon an unpredictable heading across the course of the wind and maintained in a condition of helplessness. In this situation, we submit that the fault of Captain Sato in misjudging the distance he could see ahead in a variable fog, if a fault, was a venial one, and the major faults of the Olympic II the sole proximate cause of the collision.

We have already made reference to the decisions of *La Bourgogne*, 86 Fed. 475, certiorari denied 172 U.S. 646, *The Benjamin A. Van Brunt*, 98 F. 131 (C.C.A.1), *The Kennebec*, 108 Fed. 300 (C.C.A.2) and *The Kungsholm*, 1938 A.M.C. 1334, wherein the moving vessel was held not to be responsible. If it be thought that the estimates of Captain Sato and his chief officer that the Sakito reduced her speed from approximately 16 knots to 6 - 6½ knots between 7:03 and 7:06 upon a change from full to slow ahead represent an unusually fast deceleration,

nevertheless it can scarcely be doubted that the vessel had decelerated that much before 7:09 when the Olympic was first seen.¹³ In such circumstances, if the speed at 7:09 was moderate under the observed conditions, previous speed is not a material factor except as it might have permitted those aboard the Sakito to hear one signal more of the Olympic if it was being sounded.

Dollar Steamship Line v. Matson Nav. Co. (1928)
23 F. (2d) 554, 556 (C.C.A.9) cert. denied 278
U.S. 598.

It is held under the second paragraph of Article 16 that a vessel's navigators may be excused for failure to locate direction of sound in a fog and, therefore, for failure to stop on hearing signals which, though coming from forward of the beam, were actually heard in a different direction. And so in

Steffens v. United States (1929) 32 F. (2d) 206,
208 (C.C.A.2),

Judge Learned Hand stated:

(13) The trial court's determination that the Sakito was 9120 feet distant from the Olympic at 7:03 must necessarily have been made by projecting her course from her last good fix at 5:58 a. m. (Ap. III, p. 1195) at her admitted speed for that period. While Captain Sato testified generally that at full ahead his vessel had an "over the ground" speed of 16 knots (Ap. III, p. 1087), it is obvious from the entire testimony that such speed was fixed without reference to other factors such as currents and wind, and these factors were not brought to his attention when such answer was given. It is undisputed that the Sakito was heading into a northeast wind of force 1. (Ap. II, p. 824) The record as to current is meagre, but Johnson, fishing from the port or seaward side of the Olympic, testified that the surface current was seaward and a little to his right. (Ap. II, pp. 567-8) Accordingly, we do not think nice calculations based upon a fix 65 minutes earlier can be considered to establish a position of 9120 feet from the Olympic at 7:03 and immoderate speed thereafter.

“We read the rule as imposing an absolute duty only when the ship believes that the signal comes from ahead.”

Applying this principle to the first paragraph of Article 16, we submit that, since the Sakito was so navigated as to be able to avoid collision with the Olympic if seen within the distance her officers estimated visibility to extend, there was no fault of the Sakito. We further submit that, in fixing a moderate speed, the Sakito was entitled to assume that she would be afforded warning by fog signals as a substitute for sight, and that if these had been properly sounded, they would have been heard by those on board the Sakito.

D. The Maneuvers of the Sakito Before and After the Collision Were Proper.

(a) Maneuvers before the collision.

The maneuvers of the Sakito before the collision and after the Olympic was sighted were skillful and in conformity with all practices of good seamanship. The testimony of all the witnesses on the Sakito who saw the Olympic before the impact is unanimous to the effect that the Olympic lay approximately dead ahead at right angles. Captain Sato so testified. (Ap. III, pp. 1230-32) Chief Officer Yokota so testified. (Ap. II, p. 840) Shimada, the lookout at the bow, testified that the Olympic might not have been exactly at right angles. (Ap. II, pp. 948, 949) Stiles, for libelant, however, aboard the Olympic, and apparently the first man to appreciate *the grave danger* to her, saw the Sakito's *entire star-board side* 100 to 150 yards away. (Ap. II, p. 717) The

Sakito's mechanical course recorder, showing a heading of 340°, is unimpeachable. (Ap. II, p. 856, Exhibit J) The course recorder demonstrates that the heading of the Sakito changed from 340° true to 350° true before the impact. This was a change in heading of only 10°. It is to be remembered in this connection that even though the change of heading might take place immediately following the change in the rudder, the vessel would proceed in her previous path for a considerable distance before she would start to move out of her tracks in the direction of the rudder. (Ap. III, pp. 1255-8) Captain Sato also testified that if the rudder had not been changed and the Sakito had continued on the course she was on when the barge was sighted, the stem of the Sakito would have struck the Olympic only a few feet farther forward than the actual point of impact. (Ap. III, p. 1257) The order "hard astarboard" was given by Captain Sato because it is an instinctive policy to turn to the right when an object is sighted ahead. (Ap. III, p. 1119) At the time the order was given, he thought it was possible the Sakito might clear the barge by this maneuver. (Ap. III, pp. 119-20)

The court will recall that the Olympic was tied up so that her heading would be due west and that Captain Anderson testified that she would swing about one point in either direction. She was ballasted to such a degree that she would be more likely to be windrode than tide-rode. (Ap. II, p. 777)

The West Cherow (1921), 276 Fed. 585 (E.D.Va.)

Accordingly, if the northeast wind had swung the Olympic

about a point, or 10° , to port, and her heading was 260° at the time of the collision, and that of the Sakito 350° , as the master of the latter testified, the angle of collision would be exactly a right angle. In this connection it must be borne in mind that the Olympic's draft aft was 16.6 feet, and forward only 15 feet. (Ap. II, p. 740)

The "hard astarboard" was a logical and correct order both under Article 18 and under the starboard-hand rule declared in Article 19 of the International Rules. (33 U.S.C.A., secs. 103, 104) Captain Sato's orders of "hard astarboard" and "reverse" at 7:09, when the Olympic was sighted, were calculated to avoid a collision if anything could do so. At the time the order was given, Captain Sato knew the barge's heading was to the port of the Sakito. (Ap. III, p. 1227)

In view of the testimony contained in the record which has been mentioned above, there is no room for argument concerning the fact that the maneuvers of the Sakito before the collision and after the barge was sighted were proper and in accordance with the best principles of seamanship.

(b) Maneuvers after the collision.

The maneuvers of the Sakito after the collision have been challenged, but when an analysis is made of all of the evidence and testimony, it is apparent that the Sakito's maneuvers at this time were also proper and beyond criticism. There can be no doubt that the propellers of the Sakito were going astern at the time of the impact. This is the uncontradicted testimony of the officers of

the Sakito substantiated by the log entries. (Ap. II, p. 841; Olympic's Exhibit 13; Ap. III, p. 1186) This is also confirmed by the testimony of Collins, who, because of his experience with Diesel engines, detected a denser smoke coming from the stack of the Sakito as she approached the Olympic, indicating her engines were full astern. (Ap. III, p. 1064)

At the time of the impact, Captain Sato estimated the speed of the Sakito at about 1 to 1¼ knots (Ap. III, p. 1125) Chief Officer Yokota estimated the speed at this time at a mile and a half or two miles. (Ap. II, p. 844) As closely as Captain Sato could fix it, the Sakito moved ahead and shoved the Olympic through the water for a distance of 20 to 30 meters before the Sakito came to rest. (Ap. III, p. 1125) The impact caused the Olympic to list somewhat to starboard, 15° or more. (Ap. I, pp. 439-40; Ap. II, p. 591; Ap. III, p. 1067) When the Sakito's headway was checked, the port side of the Olympic settled and dropped down from the raked bow of the Sakito and the momentum of the Olympic continued until the barge also came to rest. These factors caused the two vessels to separate, and were described by several witnesses. Mr. Harris gave a clear account of it. (Ap. II, pp. 517-18) Mr. Collins also closely observed and followed the movements of the two vessels after the impact. (Ap. III, pp. 1067-8))

It was not until after the two vessels had separated that the Sakito's engines, stopped at 7:11, were again put astern at 7:13. Thus, the engines were put full astern when the barge was sighted at 7:09, the collision occurred

at 7:10½, and the engines were stopped at 7:11. (Ap. II, pp. 826, 7) The engines were next put astern at 7:13, and this was after the two vessels had separated because of the factors previously described. (Ap. III, p. 844)

Captain Sato and Chief Officer Yokota described in detail why it was impractical and dangerous, after the two vessels had separated, for the former to put the engines ahead and attempt to wedge the bow in the hole in the port side of the Olympic. The probable serious consequences and difficulty of such a maneuver were described by them. (Ap. II, pp. 909-10; Ap. III, pp. 1131-32)

After the two vessels had separated and the Sakito's engines were put astern at 7:13, the vessel backed a distance of about 100 meters so that it would be safe to drop her anchor, and a life boat was lowered as soon as the vessel came to rest. The anchor was dropped at 7:17, the vessel's motion checked and her engines stopped at 7:19, and the life boat lowered into the water at 7:20. (Ap. III, pp. 1131, 1136, 1137)

These maneuvers of the Sakito, both before and after the collision, were directed by a trained, highly qualified and experienced officer. Captain Sato, who gave such orders, was on the bridge of the Sakito Maru. He knew her characteristics and maneuverability and observed the conditions as they existed at the time. He judged the propriety of each maneuver in the light of existing conditions as guided by his apperception. Admiralty courts have frequently refrained from substituting their judgment on such matters for that of a master. We do not

note in the record of these proceedings attributes of any person's judgment upon the matters under discussion which indicate a judgment superior to that of Captain Sato.

The M. M. O'Brien (E.D.N.Y.) 1932 A.M.C. 996, 998;

The Harold (1922) 287 F. 757, 758 (S.D.N.Y.);

The Mary T. Tracy (1925) 8 F. (2d) 591, 593 (C.C.A.2);

The Clarence L. Blakeslee (1917) 243 F. 365, 366 (C.C.A.2);

The Nannie Lamberton (1898) 85 F. 983, 984 (C.C.A.2).

VIII. THE DOCTRINE OF "LAST CLEAR CHANCE" COULD IN NO EVENT BE APPLICABLE SINCE THE SAKITO MARU DID NOT SEE THE OLYMPIC'S POSITION OF PERIL IN TIME TO AVOID HER.

In holding that the Sakito Maru might be held liable notwithstanding the fault, if any, of the Olympic, because she *ought* to have seen the Olympic, and, therefore, *had* the last clear chance to avoid the loss (Ap. I, pp. 137, 8), the trial court has mutilated the fundamentals of that doctrine. (Ass. of Err. XXV, Ap. I, p. 254)¹⁴

It is rudimentary that the last-clear-chance doctrine comes into play only when the respondent is aware of

(14) "The District Court erred in finding that even if the Olympic II and her owners might be at fault, the Sakito Maru, by the exercise of reasonable care and prudence, could have avoided the collision and is therefore chargeable with sole fault for the collision and the resultant loss of life, personal injuries and property damage."

the libelant's self-imposed situation of danger. It assuages the rigors of the doctrine of contributory negligence where the other party is aware of the danger and can, but does not, take steps to avoid it. It has no application where the party charged has not observed the other's position and the negligence of each continues to the time when accident is unavoidable. *Scienter* is, in such cases, indispensable to the application of last clear chance, for without it the other party has no chance to avoid the consequences of the continuing negligence of the injured party.

Chunn v. City & Suburban R. Co. (1907) 207 U.S. 302, 52 L. ed. 219, 222, 28 S. Ct. 63;

Nielsen v. Richman (1940), 114 F. (2d) 343, 350 (C.C.A.8), cert. den. 311 U.S. 705;

Sprinkle v. Davis (1940), 111 F. (2d) 925, 928 (C.C.A.4);

Arnold v. S. F. etc. Ry. Co. (1917), 175 Cal. 1, 164 Pac. 798.

The holding that the last-clear-chance doctrine might be invoked to excuse negligence of the Olympic, which continued to the very moment of collision although those on the *Sakito Maru* did not see her, was, we submit, clearly erroneous. Under the facts supposed by the trial court, there was a pure case of concurrent negligence.

CONCLUSIONS.

We respectfully submit that the faults of the Olympic II were so gross and manifold that it was error to absolve her from fault for the collision. We further submit that such faults were of such major significance that any fault which might be found against the Sakito Maru would be of insufficient stature to inculcate her. Accordingly, we respectfully request that the decree of the district court herein be reversed in its entirety, or that, if this court shall conclude that any substantial fault of the Sakito Maru contributed to the collision and loss, said decree be modified to one of mutual fault.

Respectfully submitted,

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Proctors for Appellants.

Dated: October 17, 1942

No. 10190.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

STERLING CARR, as Trustee in Bankruptcy of NIPPON
YUSEN KABUSHIKI KAISYA, a Corporation, Bankrupt;
and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
a Corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD., a Corpora-
tion, and J. M. ANDERSEN,

Appellees.

(And Thirteen Consolidated Appeals.)

**APPELLEES' MOTION TO DISMISS CERTAIN
APPEALS AND APPELLEES' REPLY BRIEF
ON THE MERITS.**

FILED

ALFRED T. CLUFF,

HUGH B. ROTCHER,

GEORGE H. MOORE,

ALLAN F. BULLARD,

1008 South Pacific Avenue, San Pedro, Calif.,

Proctors for Appellees.

DEC 28 1942

PAUL P. O'BRIEN,
CLERK

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No. 10190.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

STERLING CARR, as Trustee in Bankruptcy of NIPPON
YUSEN KABUSHIKI KAISYA, a Corporation, Bankrupt;
and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
a Corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD., a Corpora-
tion, and J. M. ANDERSEN,

Appellees.

(And Thirteen Consolidated Cases.)

**MOTION OF APPELLEES TO DISMISS
CERTAIN APPEALS.**

The appellees, Hermosa Amusement Corporation, Ltd. and J. M. Andersen, hereby move that the court dismiss each of the appeals herein, hereinafter designated, upon the following grounds:

1. That none of the libelants or intervening libelants named in the decree appealed from joined or are joined as appellants with the appellants herein in the said appeal, and no summons and severance or equivalent proceeding was had as to such non-joining party or parties.

2. That the libelants or intervening libelants named in the decree appealed from are necessary parties to the

appeal from said decree, and are not joined herein either as appellants or appellees.

The following are the appeals to each of which the motion is directed [Sec A. I., pp. 274-6]:

- B. Appeal from decree in cause 1138-BH, in favor of Grace E. Mayo and Frank F. Mayo, Intervening Libelants, for \$4100.00.
- C. Appeal from decree in cause 1138-BH, in favor of George W. Berger, Libelant in Intervention, for \$11,409.59.
- D. Appeal from decree in cause 1138-BH, in favor of Norma Rubin, Lena Karsh, Florence, Lillian and Shirley Rose Karsh, etc., Libelants in Intervention, for sums aggregating \$7330.42.
- E. Appeal from decree in cause 1138-BH, in favor of Albertine K. Johnson, etc., Libelant in Intervention, for \$4500.00.
- F. Appeal from decree in cause 1138-BH, in favor of John Gilbert Montgomery, etc., Libelant in Intervention, for \$625.00.
- G. Appeal from decree in cause 1138-BH, in favor of S. T. Elliott, Libelant in Intervention, for \$300.00.
- H. Appeal from decree in cause 1146-Y, in favor of Roger S. Culp, etc., Libelant, for \$4050.00.
- I. Appeal from decree in cause 1147-BH, in favor of Wilma Greenwood, etc., Libelant, for \$7500.00
- J. Appeal from decree in cause 1148-Y, in favor of Helen McGrath, etc., Libelant, for sums aggregating \$20,000.00.
- K. Appeal from decree in cause 1149-RJ, in favor of L. R. Ohiser, Libelant, for \$385.00.
- L. Appeal from decree in cause 1154-B, in favor of J. Eldon Anderson, Libelant, for \$300.00.

- M. Appeal from decree in cause 1155-BH, in favor of Lucy Sylvester, etc., Libelant, for \$5000.00.
- N. Appeal from decree in cause 1296-BH, in favor of Wilfred Rasmussen, Libelant, for \$1000.00.

Dated: December 23, 1942.

ALFRED T. CLUFF,
HUGH B. ROTCHFORD,
GEORGE H. MOORE,
ALLAN F. BULLARD,
Proctors for Appellees.

Notice of Motion.

To the Appellants herein and to their Proctors:

Please take notice that on Monday, January 11, 1943, at the hour of 10:00 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, at the courtroom of the United States Circuit Court of Appeals for the Ninth Circuit, in the Post Office Building, San Francisco, California, the appellees herein will move the court that it dismiss each of the appeals designated in the foregoing motion, upon the several grounds stated in said motion.

Dated: December 23, 1942.

ALFRED T. CLUFF,
HUGH B. ROTCHFORD,
GEORGE H. MOORE,
ALLAN F. BULLARD,
Proctors for Appellees.

APPELLEES' POINTS AND AUTHORITIES ON MOTION TO DISMISS CERTAIN APPEALS.

Statement.

On September 4, 1940, three miles to seaward of the Los Angeles Breakwater, the appellants' Motor Vessel SAKITO MARU ran down and sank the appellees' vessel OLYMPIC II, at anchor. Eight lives were lost, several persons were injured and considerable property of third persons on OLYMPIC was lost.

Following this disaster a suit was filed in the District Court for the Southern District of California by the appellee, Hermosa Amusement Corporation, Ltd., as owner of OLYMPIC against SAKITO and her owner, the appellant, Nippon Yusen Kabushiki Kaisya, for the loss of OLYMPIC and her equipment. This was cause No. 1138-BH and is identified by the symbol A in the stipulation hereinafter referred to. Thereafter the representatives of persons who lost their lives, persons who were injured and persons who lost property as a result of the collision filed libels in intervention in cause No. 1138-BH or filed independent libels. Some of these named as respondents only SAKITO and the appellant, Nippon Yusen Kabushiki Kaisya, but others also named the appellees as owner and master of OLYMPIC as respondents.

In all of these last mentioned libels and proceedings the appellant appeared and answered as respondent or claimant, or both, and thereafter filed third party petitions under the 50th Admiralty Rule, alleging that the collision was due solely to the faults of OLYMPIC and of the appellees, who were named as third party respondents. The appellees, as such third party respondents, answered

the petitions and the libels and intervening libels. All causes being at issue they were consolidated for trial, and a trial was held as to the issues of liability as between the two vessels. The trial court thereupon rendered an opinion holding that the collision was due solely to the fault of SAKITO, exonerating OLYMPIC and appellees, and directing that libelants recover their damages from her and her owner. The trial was continued for proof of the claims of the libelants and intervening libelants.

The amount of damage in the principal suit, in which the appellee, Hermosa Amusement Corporation, Ltd., was libelant, was fixed in reference as were two other property loss claims. The death and personal injury claims were heard by the court. In many of these the damages were fixed by agreement between the claimants and the appellant. After all damages had been liquidated the court made its separate decree upon each claim.

There were fourteen separate decrees, including the decree in the principal cause. The appellant, Nippon Yusen Kabushiki Kaisya, and its surety appealed from each decree, but in all cases but the principal case (wherein only the appellee, Hermosa Amusement Corporation, Ltd., was a libelant), the appellants failed to join as appellant or appellee the successful libelant or intervening libelant, and named as appellees only Hermosa Amusement Corporation, Ltd. and Captain Andersen, who were the respondents named in their third party petition. There was no summons and severance or the equivalent as to any of these libelants.

Our motion is directed to the separate appeal in each of the thirteen causes, in or in respect to which third party petitions were filed by the appellant, and wherein the ap-

peal does not join as appellant or appellee the successful libelant or intervening libelant therein. The decree appealed from in each case dismissed the libel or intervening libel and the third party petition as to both appellees, and awarded the latter their costs against the libelant *and* the third party petitioner.

The causes are those described in the stipulation at A. I, pp. 273 *et seq.*, and marked by the letter symbols B to N inclusive [*id.* 274-5]. Cause A is the principal cause in which no third parties were involved as libelants, and that cause is not attackable by the motion.

In order to prevent duplication in the printed record it was stipulated [A. III, pp. 1415; 1422; 1424-5] that the pleadings and decree in cause B are typical in substance with the proceedings in all causes based on libels in intervention (B, C, D, E, F and G) and the proceedings in cause J are typical in substance with the proceedings in all causes based upon independent libels (H, I, J, K, L, M and N). The papers on appeal in cause C are typical of the appeal papers in all the other causes involved in this motion.

It will readily be observed that the issues tendered against the appellees by the libel and third party petition in each case are identical in substance in all cases, to-wit, the fault for the collision. The decrees resolved these issues in favor of the appellees and against the libelants and appellant as third party petitioner, and awarded joint judgments for costs. Each decree refers to the opinion of the court and adopts the findings therein set forth. [See Decree in Cause B, A. I, pp. 181; 183-4; Cause J, *id.* pp. 239; 243.]

It also will be observed from the typical appeal papers in cause C that the petitioners for appeal [A. I, pp. 261-2] are Nippon Yusen Kabushiki Kaisya, its surety, and Mr. Carr as receiver in bankruptcy for Nippon Yusen Kabushiki Kaisya; that the appeal is from the *final decree* and not from a part thereof, and that the errors urged in the assignments of error cover the entire question of liability for the collision. [*Id.* pp. 263-8.] The typical citation on appeal [*id.* p. 3] is directed to Hermosa and Captain Andersen, as appellees. There is no showing of any summons and severance or the equivalent.

POINTS AND AUTHORITIES.

I.

The decree in each cause (B to N inclusive) is, in so far as it determines the liability of these appellees in respect to the subject matter of the libel and third party petition, joint in form and joint in substance. It dismisses the pleadings by which each party asserted that single liability against appellees and awards a joint judgment for the appellees' costs against the libelants and the appellants.

II.

It is elementary that where a party desires to appeal from a joint judgment or decree, he must procure the joinder *as appellants* of all parties against whom the decree or judgment runs, or proceed alone only after proper

summons and severance or its equivalent. Failing both, the appeal must be dismissed.

Masterson v. Herndon, 10 Wall. 416;

Hardee v. Wilson, 146 U. S. 179;

Davis v. Mercantile Trust Co., 152 U. S. 590;

Hartford Accident Co. v. Bunn, 285 U. S. 169;

Mitty Bros. Construction Co. v. United States (C. C. A. 9), 75 Fed. (2d) 79;

Pflueger v. Sherman (C. C. A. 9), 75 Fed. (2d) 84;

Hudson v. Pacific Trust Co. (C. C. A. 9), 93 Fed. (2d) 821.

III.

The new Rules of Civil Procedure, which permit an appeal by any party without summons and severance, do not apply in an admiralty cause.

Rule 1;

Rule 81, Subd. 1.

IV.

Assuming the court is disposed to look beyond the faces of the decrees, it will be readily ascertained on the face of the record that as to the liability of the appellees there were no severable issues as between the appellants and the libelants in any cause. Each asserted against the appellees the same charge—fault for the collision. Cases of independent claims for several liability, such as *The Columbia* (C. C. A. 9), 73 Fed. 226, are not in point.

V.

This is not the usual technical motion made in admiralty causes, where an appellant has inadvertently failed to join his stipulator for value. Nor are the judgments here joint only as to execution, as in *Eliot v. Lombard*, 292 U. S. 139. The appellant and the libelants both litigated these causes against the appellees upon the same issues and the adjudications of the decrees run against both.

VI.

The appeals are from the whole of each decree. If the recitals of the petition [A. I, p. 262] indicate an attempt to bring the appeal within Rule 4 of the Rules in Admiralty of this court relating to review in part only, they failed of their purpose. That rule requires that the appellant *state in his petition* for appeal that he desires *only* to review one or more questions. No such statement can be found in these petitions. The appellants state that "they may have reviewed" the questions whether OLYMPIC II was not in fault and whether SAKITO MARU was not free from fault. Obviously such a review would be a review of the whole case as far as liability is concerned. Furthermore, the petitions do not state that the appeal is limited to the specified questions, and therefore must be taken as an appeal from the whole of the decree.

Even if the appeal be held limited to the specific questions stated, a review of the conduct of the OLYMPIC in any respect would involve the interests of each libellant. They are just as indispensable as parties to such a review as to a review of the whole judgment.

VII.

If for any reason the libelants and intervening libelants are not required to be made parties appellant to these appeals or to be summoned and severed, it is unmistakable that they are indispensable parties to the appeal in *some* capacity. It is elementary that all parties affected by a judgment must be made parties appellant *or* appellees. These libelants are not joined in any capacity. The appeals should, therefore, be dismissed for lack of necessary parties.

Davis v. Mercantile Trust Co., 152 U. S. 590;
Wilson v. Kiesel, 164 U. S. 248;
Babcock v. Norton (C. C. A. 2), 5 Fed. (2d) 153;
Interstate Oil Co. v. Gormley (C. C. A. 9), 105
Fed. (2d) 431.

Respectfully submitted,

ALFRED T. CLUFF,
HUGH B. ROTCHFORD,
GEORGE H. MOORE,
ALLAN F. BULLARD,
Proctors for Appellees.

No. 10190.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STERLING CARR, as Trustee in Bankruptcy of NIPPON YUSEN KABUSHIKI KAISYA, a corporation, Bankrupt, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD., a corporation, and J. M. ANDERSEN,

Appellees.

(And Thirteen Consolidated Cases.)

APPELLEES' REPLY BRIEF ON THE MERITS.

Statement of Facts.

The OLYMPIC II, at anchor on the open sea, something more than three miles to seaward of the Los Angeles Breakwater entrance, was run down and sunk at her anchors by the Japanese Motorship SAKITO MARU. The trial court found: (1) the OLYMPIC II was anchored on a long established and well known fishing ground or bank, frequented constantly by fishing craft of all descriptions, including fishing floats or hulls of the type and occupation of the OLYMPIC II; that she was not anchored in or in the vicinity of any channel or fairway, but was surrounded by miles of navigable water [A. I, pp. 113-5];

(2) that the collision occurred in daylight, but in a light fog which, at the time of the collision, was beginning to lift, with the bright sun breaking through; that the visibility was *at least* 1800 feet [*id.* pp. 116-20]; (3) that by “overwhelming evidence” it was established that the OLYMPIC II was sounding proper fog signals [*id.* p. 127]; that the SAKITO MARU, by the evidence of her own records, was proceeding at a speed of not less than 8 miles per hour when she sighted the OLYMPIC II about 200 meters ahead; that even at a speed of 6½ miles per hour she would require 300 meters to come to a stop [*id.* pp. 120-24]; and (4) that, assuming upon conflicting evidence that the SAKITO MARU had a lookout properly posted, he was a lookout in name only; he failed to see the OLYMPIC II until long after she was within his range of vision, and that if he had been an efficient lookout the collision could easily have been avoided. [*Id.* p. 124.]

Naturally the court’s judgment was that the collision was due solely to the faults of the SAKITO MARU.

All the essential facts necessary to an understanding of how the collision happened are given in the above summary of the principal findings, and we do not think a long statement by us will be of any assistance to the court. The statement of the appellants (Br. pp. 3-10) gives the character and dimensions of the vessels and the course of the SAKITO, and if we disregard a few over-demonstrative adjectives and adverbs, and make due allowance for theatrical expressions, the statement is sufficient for general purposes. We shall defer detailed statements on particular points to the specific discussions thereof.

It should be noted that the statements as to the SAKITO’s speeds after 7:03 A. M. (Br. pp. 5-6) are dis-

puted and were not accepted by the court. There was convincing evidence from her own testimony and records that her speed between 7:03 A. M. and the collision was as high as 10 to 14 miles per hour.

The actual distances between the three anchored barges is important on several aspects of the case, particularly as affording measures of visibility.

The positions of the three barges and the distances between them were definitely fixed by Boatswain Reeder of the Coast Guard, by observations taken on two occasions at the beginning of the fishing season. The positions of the three vessels were the same on the morning of the collision, except that on that morning the POINT LOMA was heaving up her anchors, preparatory to going in for the winter, and had pulled short on her bow anchor until her hull and the OLYMPIC's were practically abreast. This, of course, did not alter the lateral distance that separated them.

Mr. Reeder's observations, which were accepted by the trial court and embodied in the findings [A. I, p. 114], established the positions of the three barges as follows:

SAMAR (RAINBOW)— 144° true, 3 miles from the lighthouse on the Los Angeles Breakwater.

POINT LOMA— 159° true, 3 miles from the lighthouse.

OLYMPIC II— 160° true, 3.2 miles from the lighthouse.

The OLYMPIC and POINT LOMA were therefore practically abreast .2 of a mile apart, and the SAMAR was about $\frac{2}{3}$ of a mile astern of the POINT LOMA. The actual distances between the three vessels was: OLYMPIC to SAMAR 1800 yards; POINT LOMA to SAMAR 1600 yards; OLYMPIC to POINT LOMA 400 yards. [A. III, pp. 1369-

72.] The accurate distance between the OLYMPIC and POINT LOMA is particularly important as that was the standard by which the accuracy of many of the estimates of visibility was measured. The writer of the SAKITO's brief has overlooked or ignored the distances established by Mr. Reeder and found by the court, and has used some computations of Lt. Hewins of the Coast Guard, which were made from over the wreck of the OLYMPIC after she had sunk. [A. III, p. 969.] He fixed, from his recollection, the distance between the OLYMPIC and POINT LOMA before the collision at $1/8$ of a mile, 260 yards. [*Id.* pp. 985; 987.] When counsel use Lt. Hewins' estimate, as reflecting the true distance between the two barges prior to the collision, they overlook the fact that the collision tore the OLYMPIC from her stern anchor and drove her broadside through the water and toward the POINT LOMA a very considerable distance. Captain Collins, SAKITO's witness, said that the impact of the collision so far toward the POINT LOMA cut the distance about half. [A. III, p. 1076.] Many other witnesses observed this movement. It follows, therefore, that Lt. Hewins' observations, taken on top of the sunken wreck after the collision, do not reflect the true distance between the two barges before the collision, and his recollection as to where the OLYMPIC had lain was evidently inaccurate.

We must also add some details of the actual collision and its effect on the OLYMPIC:

When those on the SAKITO tardily woke up to the presence of the OLYMPIC, the SAKITO's rudder was put hard right, and when she struck the OLYMPIC she was swinging to the right. This turn caused her to hit the OLYMPIC's port side and cut the OLYMPIC in two—side,

decks, bottom and keel, so that her bow overhung the OLYMPIC's *starboard* side. Measurements taken of the scars on the SAKITO's bows show that she made a breach in the OLYMPIC's side at least 12 feet wide and with over 23 feet of penetration into her hull, tearing through decks, bottom and keel. [A. III, pp. 1377-85.] The shock of the impact was enough to stop the swing of the SAKITO's stern to port and cause it to swing 30° to starboard. [See Course Recorder tape at approximately 7:10 A. M., A. II, p. 856.] In this swing the SAKITO was a gigantic crowbar with a 23-foot "bite" into the OLYMPIC's side. Following the collision the SAKITO backed or drifted out of the hole in the OLYMPIC's side, and the OLYMPIC sank within three or four minutes.

One of the OLYMPIC's shoreboats, the LILLIAN L, had just brought a few patrons to the OLYMPIC and was lying at her starboard gangway, with engines running. When the LILLIAN L's skipper saw the SAKITO approaching he shouted to the patrons and dashed back to his boat. A number of patrons got on board the LILLIAN L. Her skipper held the LILLIAN L alongside until the impact and, although the little craft was nearly swamped as the OLYMPIC was driven sideways through the water, she managed to pull clear with her passengers. [A. II, pp. 719-23.] Meanwhile another water taxi, the H-10 No. 17, had been drifting near the POINT LOMA, which was about 400 yards inshore of the OLYMPIC. Her skipper was warned of the approach of the SAKITO, had started his taxi over to the OLYMPIC, and had come up to her bow when the impact occurred. When the LILLIAN L had fought herself clear of the OLYMPIC and the latter's sideways movement ceased, the H-10 No. 17 went alongside the OLYMPIC's gangway, in the place vacated by the

LILLIAN L, and took off many patrons. She was still alongside when the OLYMPIC went down. [A. II, pp. 611-24.]

The OLYMPIC was equipped with a lifeboat and an approved launching device, but with the two powered taxis alongside and other powered boats in the vicinity speeding up to the OLYMPIC's position, the OLYMPIC's crew wisely made no attempt to launch the lifeboat, but devoted their efforts to serving out life preservers and directing and assisting the patrons onto the taxis. Every person on the OLYMPIC apparently received a life preserver. Greenwood, the barge master, and Culp, the bait boy, went down with their ship, never relaxing their efforts to save the patrons. Ohiser, the watchman, was saved only because he jumped to the roof of the H-10 No. 17, better to assist the patrons, and when the OLYMPIC sank he was half into the water with a young girl in his arms. [A. II, pp. 623-4; 673.]

Nature of the Evidence.

In the immediate vicinity of the OLYMPIC's place of anchorage were five other vessels, at anchor or drifting on the fishing grounds. They were the POINT LOMA, a wooden fishing barge, similar to the OLYMPIC, anchored about 400 yards inshore of her; the tug RAY R. CLARK, which was lying near the POINT LOMA, with her master aboard the latter vessel; the water taxi H-10 No. 17, which took off the last of the OLYMPIC's survivors, and the PAT and the MAR-ELL, two small fishing boats which were anchored just astern of the OLYMPIC. None of these vessels was involved in the collision except as rescue vessels, and the testimony of their people gave the court a backlog of neutral evidence, which is very rare in colli-

sion cases. All of these neutral eye-witnesses testified in open court, five being called by the OLYMPIC and two by the SAKITO. The survivors from the OLYMPIC testified in court, as did the master of the SAKITO. Yokota, the SAKITO's first officer, and Shimada, her lookout, testified by deposition. Kato, the chief engineer, testified by deposition, but he was not an eye-witness and his testimony consisted principally of engine-room detail and records, which was not controverted. A few minor witnesses from the SAKITO's deck watch were unavailable at the trial, owing to the suspension of sailings between Japan and the United States. A motion for continuance was made by the SAKITO's counsel on account of the absence of these witnesses, but was denied by the court upon an offer by counsel for OLYMPIC and counsel for other libelants to stipulate that such witnesses, if sworn, would testify in accordance with certain written statements produced by the SAKITO's counsel. The stipulation was accepted and the written statements were received and considered in evidence. [A. III, pp. 1287-94.] These statements are either negative or cumulative.

All the crucial witnesses on both sides testified in open court with the exception of the SAKITO's first officer and lookout. Their testimony, given by deposition in advance of the trial, was in the main consistent with the story of the SAKITO's master.

Applying the rule of *The Ernest H. Meyer* (C. C. A. 9), 84 Fed. (2d) 496-501, it would seem that upon disputed factual issues the presumption in favor of the trial

court's findings has great weight; possibly not the greatest weight which would be given when all witnesses testified in court, but certainly far more than the minimum weight which is given when all the evidence, or all of one side's evidence, is given by deposition. We take it that the weight of the presumption is always a variable, depending upon the circumstances and the particular issues to which the presumption is to be applied.

We understand the rule of this court to be that when this court has weighed the whole evidence, with the presumption in favor of the correctness of the trial court's findings, it will not disturb the decision of the trial court on controverted questions of fact, unless they are clearly against the *weight* of the evidence.

The Ernest H. Meyer (supra, p. 500).

Another rule of this court which must serve as a guide in factual examination is that the court cannot re-determine the credibility of witnesses heard below, and will presume that the trial court, hearing the witnesses, rejected testimony of factors not comports with its findings.

Crowley Launch & Tugboat Co. v. Wilmington Transportation Co. (C. C. A. 9), 117 Fed. (2d) 651; 653.

ARGUMENT.

I.

The Case Against the SAKITO MARU.

Although it will reverse the order of presentation selected by the appellants, we shall examine first the attack on the trial court's findings of fault against the SAKITO, the moving vessel. (Br. pp. 57-69.)

In considering the SAKITO's conduct we must ever bear in mind the presumption of fault which is to be applied when a vessel in motion runs down a vessel at anchor.

The Granite State, 3 Wall. 310; 18 L. Ed. 179, 180;

The Virginia Ehrman, 7 Otto 309; 24 L. Ed. 890, 892;

— (*The Oregon*, 158 U. S. 186; 15 S. Ct. 804;

The Southern Cross (C. C. A. 2), 93 Fed. (2d) 297;

The Providence (C. C. A. 2), 67 Fed. (2d) 865;

The City of Norfolk (C. C. A. 4), 248 Fed. 780;

(*United States v. King Coal Co.* (C. C. A. 9), 5 Fed. (2d) 780.

In the last case the court said:

“The barge Ruth was at anchor with her anchor lights burning. Her anchorage was not in a forbidden area. Her visibility to moving shipping was normal, and her position was discovered in time for safe navigation on the part of the submarine. The presumption is, in such a situation, that the barge at anchor, properly lighted, was not at fault, while, on

the other hand, the presumption is that the moving submarine, charged with reasonable caution, was at fault, and the evidence supports this presumption.” (p. 783.)

The trial court has found that the OLYMPIC was anchored in a proper place, and was sounding proper fog signals. We shall see that these findings are sustained by the great weight of evidence. The presumption of fault is, therefore, heavy upon the SAKITO, but it is so clear from the evidence that she was guilty or demonstrable fault that the presumption is hardly needed.

The trial court found the SAKITO in fault in two major respects: excessive speed in fog, and insufficient lookout. These faults are established by the overwhelming weight of the evidence; indeed SAKITO's own testimony admits that she was going at such a speed that she could not come to a stop within the whole distance which her witnesses claim they could see ahead. The court found also that the actual visibility was three times the distance claimed by the SAKITO, and that there would have been ample time for the SAKITO to have seen and avoided the OLYMPIC if the SAKITO had been keeping a proper lookout.

As a preliminary to an accurate appraisal of the SAKITO's conduct we should have the background of the actual visibility at the time of collision, and of the nature and audibility of the fog signals being sounded by the OLYMPIC and other vessels in the vicinity:

A. VISIBILITY.

As was pointed out in the factual statement, the distances between the three fishing barges had been found on the basis of observations taken before the collision by Boatswain Reeder of the Coast Guard Cutter CAHOONE, and these measurements give us a good yardstick with which to test the evidence and estimates of visibility of the various witnesses.

The OLYMPIC and POINT LOMA were nearly abreast, as observed by Mr. Reeder, and were actually abreast on the morning of the collision, as the POINT LOMA had hove short on her bow anchors. [A. III, p. 1062.] Practically all the witnesses testified that the POINT LOMA and the OLYMPIC were just about abreast, as is delineated in the OLYMPIC's Exhibit 4. [A. I, p. 359.] The lateral distance between the OLYMPIC and the POINT LOMA was 400 yards (1200 feet), and the SAMAR was 1600 yards astern of the POINT LOMA (probably nearer 1800 yards after the POINT LOMA had pulled up on her bow anchor) and 1800 yards on the starboard quarter of the OLYMPIC.

The RAY R. CLARK, a tug, was drifting alongside the POINT LOMA's port bow, and the water taxi H-10 No. 17 was drifting and fishing just beyond the RAY R. CLARK.

A little fishing boat, the MAR-ELL, was anchored about 200 yards directly astern of the OLYMPIC, and another little fishing boat, the PAT, was anchored very near to the MAR-ELL.

We can, therefore, present the testimony as to visibility at the time of collision from three viewpoints (1) from the OLYMPIC herself, (2) from the two little fishing boats astern of her, and (3) from the POINT LOMA and the

small vessels alongside of her, whose people saw the SAKITA approach over the deck of the OLYMPIC.

The witnesses on the OLYMPIC:

Elwood Johnson, a patron who lost his son in the disaster, was fishing on the OLYMPIC's port rail. He was reeling out his line and saw the SAKITO coming out of the fog. It seemed over half a mile, probably three-quarters of a mile, away. She was headed so that it seemed she would pass ahead of the OLYMPIC and he had no apprehension of collision. He continued fishing and reeled out 200 yards of line. The SAKITO came closer and he began to fear she might run over his line, so reeled in. He could see the ship clearly and distinctly several lengths away. He thought she would clear ahead of the OLYMPIC, but she turned to her right, toward the OLYMPIC. He reeled in the rest of his line rapidly and had secured his pole when the SAKITO struck the OLYMPIC. The fog was high and the sun was beginning to break through. [A. II, pp. 552-62.]

Ohiser, the OLYMPIC's watchman, was at the bell on the main deck. Apparently he and Johnson saw the SAKITO at about the same time. He was ringing regular fog peals on the bell, and when the SAKITO came out of the fog and became clear she was five or six of her own lengths away. He had no apprehension of collision and continued to ring the regular peals. Then the SAKITO turned to her right and headed toward the OLYMPIC, whereupon he rang the bell loudly and continuously until the collision. [A. II, pp. 661-9.]

Lillian Karsh, the concessionaire's older daughter, saw the SAKITO through the kitchen window. (The kitchen was

in the OLYMPIC's after deckhouse.) She seemed quite a distance away, was headed to the westward of the OLYMPIC, and the girl did not pay much attention to it. Then someone, she thought Captain Stiles of the LILLIAN L, called her attention to it. It was getting "awfully close." Then it turned toward the OLYMPIC and the bell started ringing very fast. [A. II, pp. 583-5.]

Stanford Stiles, Captain of the LILLIAN L, had just come aboard the OLYMPIC in search of breakfast. Another daughter of the concessionaire directed his attention to the SAKITO and he went to the end of the alleyway, where he could see out. By that time the SAKITO was only 100 to 150 yards away and had evidently made her turn, as he could only see the bow, not the whole side. [A. II, pp. 715-17.]

It is fully evident that Johnson, Ohiser and Miss Karsh saw the SAKITO long before she made her turn to starboard. That turn marks the time when the SAKITO's people woke up to the presence of the OLYMPIC and saw her 200 meters ahead. It is clear from the OLYMPIC's testimony that the SAKITO was actually in sight so long before the turn that Johnson had time partly to run out and wholly to reel in his line; Ohiser to ring several regular peals on the bell, and Miss Karsh to lose interest in the approaching vessel and devote herself to other activities. It seems clearly to bear out the estimates of Johnson and Ohiser that when first sighted, the SAKITO was at least a half mile or six lengths away.

The witnesses on the fishing boats astern of the OLYMPIC:

Grothe and Walters were professional fishermen on the boat MAR-ELL. Grothe had had sea experience on deep water vessels. They could see and hear all three barges plainly, and it should be remembered that the SAMAR was actually more than half a mile away. They heard the SAKITO's fog whistle and saw her take shape as a black mass, easily half a mile away. She came clearly into sight and it seemed she would clear ahead of the OLYMPIC, but when two or three hundred yards from the OLYMPIC she turned to her starboard. [Grothe A. I, pp. 418-28; Walters A. II, pp. 648-52.] Walters estimated the visibility as about half again the distance from the MAR-ELL to the SAMAR. (Actually about 2400 yards.) [*Id.* pp. 648.9.]

Jones and Harris were pleasure fishermen on the PAT, which came to anchor about 15 minutes before the collision. As they came out to the place of anchorage the fog was quite thick, with visibility of about 300 yards, but it lightened rapidly. They did not see the SAKITO until she was about three of her own lengths away, but would have seen her earlier if they had looked. Jones estimated the *visibility* at the time he saw the SAKITO at about 2 miles. [Jones, A. II, pp. 480, 499-501; Harris, *id.* pp. 505-11.]

The witnesses on or near the POINT LOMA:

Captain Collins and Liddell were the SAKITO's witnesses. Smith, master of the H-10 No. 17, was called by the OLYMPIC.

Captain Collins of the RAY R. CLARK was on the POINT LOMA; Liddell was at the controls of the RAY R. CLARK, drifting nearby; and Smith was on his taxi, drifting near the RAY R. CLARK. All these witnesses were approximately 400 yards inshore of the OLYMPIC, and she was between them and the approaching SAKITO. They could only see the SAKITO over the OLYMPIC's deck.

Collins *accurately* estimated the distance between the POINT LOMA and the OLYMPIC as between 1000 and 1200 feet. When the SAKITO first came into his vision she was approximately the same distance the other side of the OLYMPIC. He is inclined to underestimate distances rather than overestimate them. He saw the SAKITO hit the OLYMPIC and push her almost half the distance to the POINT LOMA. He could see people on the OLYMPIC putting on life belts. He could hear all the barges ringing their bells in rotation. [A. III, pp. 1063-76.]

Liddell, Captain Collins' deck hand, was at the controls of the RAY R. CLARK. He heard the SAKITO's whistle and was trying to get a bearing on her with his compass. When he saw the SAKITO she was only 25 feet from the OLYMPIC's side and he called to Smith in the H-10 No. 17. He heard the OLYMPIC sounding proper fog signals. [A. II, pp. 767-8, 772-3.]

There was something very wrong as to Liddell's 25-foot figure, for, as we shall see, Smith in the H-10 No. 17 had time to start his taxi from inertia and cover nearly 400 yards to the OLYMPIC before the impact occurred.

Smith had his attention called to the SAKITO by Liddell. He looked and saw the SAKITO over the OLYMPIC's deck, about 600 yards on the other side of the OLYMPIC. His engine was running and he started the taxi toward the

OLYMPIC, soon attaining its maximum speed of 13 miles. He had covered the distance to the OLYMPIC's bow when the collision occurred, and the pushing of the OLYMPIC through the water made him overrun her, and he had to circle back to come around the bow and alongside the starboard gangway. Smith overestimated the actual distance between the POINT LOMA and the OLYMPIC by 100 to 200 yards. [A. II, pp. 611-18.]

SAKITO's counsel discuss the question of visibility at great length (Br. pp. 12-19). Their argument is, in short, nobody should be believed but the Japanese witnesses and Liddell. They shorten the actual distance between the POINT LOMA and the OLYMPIC to one-eighth of a mile by using Lt. Hewins' estimate, based on his recollection and on measurements taken over the *wreck* of the OLYMPIC; attempt to discredit the estimates of Collins, their own witness, and disregard his testimony (amply corroborated) that the SAKITO pushed the OLYMPIC broadside nearly half of the distance to the POINT LOMA. They add Liddell's 25 feet to an eighth of a mile and assume that was the limit of visibility. Then they claim that Liddell's testimony corroborates the SAKITO's estimates of a 200 meter visibility. All other testimony they characterize as inherently improbable and, with that characterization, sweep it away.

The trial court found on all the evidence that the visibility from the bow of the SAKITO was at least 1800 feet. We think that after the foregoing summation we need not argue that this finding is supported by the overwhelming weight of the evidence.

The court commented in its opinion as to the unsatisfactory testimony from the witnesses on the Japanese

vessel. There was great justification for this comment. First Officer Yokota testified by deposition that until he saw the OLYMPIC 200 meters ahead he thought the visibility was about 600 meters (1950 feet). But because neither he, the lookout nor Captain Sato saw the OLYMPIC until she was only 200 meters away, he infers it must have been due to his own overestimate of visibility and not to a very bad lookout. Captain Sato, who testified at the trial, thought the visibility was 300 meters, but he too claims to have made an overestimate. The lookout had no idea whether the OLYMPIC was 500 or 5000 feet away when he sighted her. Counsel hint that if the court had granted their motion for a continuance, the SAKITO's other witnesses might have developed something about the visibility. But the unchallenged statements of these witnesses, prepared by counsel's investigator, were received in evidence, and counsel do their investigator little justice when they infer that anything legitimately beneficial to the SAKITO's case was left out of those statements.

But estimates aside, the thing which to our minds fully warrants the rejection of the SAKITO's testimony of a visibility of 200 meters is their plain admission that the Japanese vessel's course was turned to starboard as soon as the OLYMPIC was discovered. They had not seen the OLYMPIC at all until a few seconds before that turn. Half a dozen witnesses from several different viewpoints saw the SAKITO approaching minutes before that turn was made;—Johnson, fishing on the OLYMPIC's deck; Ohiser at the bell; Miss Karsh in the galley, and the fishermen on the boats astern of the OLYMPIC, all saw her before

she turned and saw her make the turn. The trial court was impressed with this aspect, as well as by other circumstances mentioned in the opinion, which are self-evident without further exposition on our part.

B. OLYMPIC II'S BELL SIGNALS AND THEIR AUDIBILITY.

The court made no specific finding on the distance the sound signals from the barges could be heard, but took it for granted that they would have been heard by a diligent lookout long before they were heard on the SAKITO. The court found that the evidence was "overwhelming" that the OLYMPIC was sounding proper fog signals.

The OLYMPIC had a big ship's bell, 14 inches in diameter. (The Supervising Inspectors' Rules call for a minimum of 8 inches on *any* vessel.) Its audibility had been previously demonstrated at a distance of a mile. [A. II, pp. 773-4.] On the morning of the collision it was heard by almost everyone within a radius of a mile, except the officers and lookout of the SAKITO.

All of the barges could hear each other's bells, and it was their practice to ring in rotation so as not to mask each other's rings, and to add a final stroke or two to identify the particular barge. The OLYMPIC and the SAMAR could hear each other's bells, although they were 1800 yards apart.

Practically every witness who testified and was not operating a boat with a running engine, testified that the OLYMPIC was sounding proper fog signals. Collins and Liddell, the SAKITO's witnesses, so testified; Grothe and Walters on the MAR-ELL, and Jones and Harris on the PAT so testified; Miss Karsh, Stiles and Ohiser, the bell

ringer on the OLYMPIC, so testified. These people testified that the barges were ringing in rotation, that the OLYMPIC's peals were substantially 5 seconds long and were rung every 45 seconds to a minute, and during all material times the ringing of these peals was continuous, right up to the time the SAKITO turned to starboard. Thereafter, and up to the moment of collision, the OLYMPIC's bell rang a continuous roll. Here are some of the record references on the OLYMPIC's bell ringing: Kroth, A. I, pp. 420-23, 433-4; Jones, A. II, pp. 480-2, 487; Harris, *id.* pp. 507-8, 514; Johnson, *id.* pp. 553, 561; Karsh, *id.* pp. 582-3, 585; Smith, *id.* pp. 618-19; Walters, *id.* pp. 649, 651; Ohiser, *id.* pp. 661-3, 667, 668, 679-90, 704-5; Stiles, *id.* pp. 709-10, 713-4; Liddell, *id.* pp. 765, 768, 772-3; Collins, A. III, p. 1063.

The SAKITO's counsel even developed by hearsay that an unknown fishing boat, fishing about one-half mile southeast of the OLYMPIC and out of sight of her, had reported to the Coast Guard that they saw the SAKITO pass them, inbound, and they could hear the OLYMPIC's fog bells faintly. [A. III, pp. 1054-5.]

Counsel for the SAKITO discuss the evidence as to the ringing of the OLYMPIC's bell at pages 19-22 of their brief. As in the matter of visibility, they claim that all fact testimony opposed to them is vague, general and incredible. Apparently it is counsel's position that it is not enough that five or six witnesses testified that regular peals were rung every minute or thereabouts, and there was no cessation until just before the collision, when the peals changed to a continuous ringing (Br. p. 20), but every witness must testify as to each peal and give its exact time, or all his testimony must be rejected.

Counsel also urge that Ohiser stated that some time between 6:30 and 7:10 he stopped ringing the bell for a few minutes when the fog seemed to lift, and argue that this must have been during the critical time between 7:00 and 7:10 (Br. pp. 20-21). It is hardly necessary to say that any such assumption is, as the trial court put it, against the "overwhelming" evidence. It is reasonable to suppose that if there had been any cessation in the OLYMPIC's bell ringing, after all these experienced seamen had heard the SAKITO's whistles and were watching for her approach, at least one of whom would have noted the silence of the OLYMPIC? There must have been twenty or twenty-five qualified observers on the neighboring vessels, all of whom were interviewed by both counsel, yet SAKITO's counsel did not produce a single witness to testify that there was any cessation in the OLYMPIC's bell ringing, or that it was not proper in any other respect. We could have augmented the testimony on the bell ringing by threefold, but the trial court was manifestly impatient of cumulative evidence once he felt that a point was sufficiently established, and there were several witnesses under subpoena and in actual attendance whom we did not call.

It was small triumph for SAKITO's counsel to have confused Ohiser on cross-examination. The man had been subjected to five long inquisitions on this collision, and he was the sort of witness, often encountered, who cannot tell a story lucidly under formal examination. His time estimates were utterly impossible and he is so susceptible to suggestion that counsel can almost make him doubtful of his own existence. The trial court was fully conscious of Ohiser's instability as a witness, and stated that be-

cause of it he had disregarded his testimony entirely, except where it was amply corroborated. [A. I, p. 126.]

Whether Ohiser's evidence be entirely disregarded or considered with all its implications, we confidently submit that the audibility of the OLYMPIC's fog bell and the fact that it was properly rung during all significant times was established by the overwhelming weight of evidence, and the trial court's findings to that effect could not properly be disturbed.

Now, with the background of a visibility of at least 1800 feet, as found by the trial court, and the sound signals, proper for an anchored vessel, being sounded by OLYMPIC, we proceed to an examination of the evidence as to the faults of the SAKITO, which this court must weigh *with* the presumption of fault arising when a moving vessel runs down one at anchor.

C. THE SAKITO MARU'S SPEED.

Chief Officer Yokota claimed that when she sighted the OLYMPIC at 7:09 A. M., 200 meters away, the SAKITO's speed was 6 to 6½ miles per hour at 50 revolutions per minute of her engines. [A. II, p. 838.] Captain Sato said it was 6¼ to 6½ miles. [A. III, p. 1007.] She had cut down to "slow"—50 revolutions per minute, at 7:03 A. M. and it took three minutes for the speed to decelerate from 16 miles per hour to her normal 6-6½ mile speed at "slow ahead." She had therefore reduced to the latter speed at 7:06 and continued it until 7:09, when the OLYMPIC was sighted.

At that speed, loaded as she was, the officers believed she could be brought to a stop by a "full astern" on both engines in one and one-half or two lengths of the ship

[Sato, A. III, p. 1140]; in 300 meters. [Yokota, A. II, p. 909.] The ship's length, over all, is 154½ meters [*id.* 803].

If, as the SAKITO's witnesses insist, they were unable to see the OLYMPIC on account of impaired visibility until she was only 200 meters away, they convict SAKITO forthwith of excessive speed, for she was manifestly unable to stop within the *whole* distance her people could see ahead.

It is true, as counsel say, that the International Rule (Article 16) provides that a vessel in fog shall "go at a moderate speed," and moderate speed is not defined. The courts have fixed a test, however, which fits all conditions and all situations. It is the so-called "rule of sight," requiring that the speed in impaired visibility shall be such that the vessel can be stopped or avoid collision within half the distance she can see ahead.

We hardly need discuss the rule of sight, for this court has applied it in many recent cases.

The Ernest H. Meyer, 84 Fed. (2d) 496, 497;

Silver Line v. United States, 94 Fed. (2d) 754, 757;

The Catalina, 18 Fed. Supp. 461, *aff'd.* 95 Fed. (2d) 283.

Under these cases, any speed was excessive if the SAKITO could not stop within half the distance of visibility. She demonstrated she could not stop within the *whole distance*.

The SAKITO's master and chief officer found themselves in a very uncomfortable dilemma. They had to admit either that their speed was excessive or their lookout was woefully deficient. They chose, as the lesser of

two evils, to admit the former, and claimed that it was due to their own inability to estimate the visibility correctly. Yokota said that when the lookout reported the OLYMPIC ahead, he estimated the visibility at between 500 and 600 meters. [A. II, pp. 867-8.] That was a mistake, he admitted, because when he saw the OLYMPIC 200 meters ahead, he then realized he could not see that far. [*Id.* pp. 886-7.] Captain Sato, who testified at the trial three months later, said that just before the OLYMPIC was sighted he estimated the visibility at about 300 meters. [A. III, p. 1113.] He also admitted an erroneous estimate. [*Id.* p. 1276.]

It seems to us that if these high officers could not estimate visibility any closer than that, they are a pretty serious "peril of the sea" in themselves. If vessels are to be run on the assumption that the visibility is two or three times what it actually is, there is grave danger for other vessels so unfortunate as to be in their paths.

Yet counsel for the SAKITO insisted in the trial court and still insist here, that these overestimates are excusable. The officers, they say, made an honest mistake. They used their best judgment; it was all the judgment they had. The fault, say counsel, was a venial one, and the SAKITO should not be held liable for it unless it was a fault which a prudent navigator would not make. (Br. pp. 40, 62.)

A prudent navigator, we submit, does not take 12,000 tons of ship into a fog, approaching a busy port, and proceed on "estimates" of visibility. If he does not *know* what the visibility is, he does not proceed. Anyone who so proceeds without absolutely knowing the visibility and

that he can stop his vessel within the range of sight is negligent.

Counsel has cited *The Old Reliable* (C. C. A. 3), 269 Fed. 729 (Br. p. 40). In deciding that case the court said (p. 729):

“It is not ‘inevitable accident’ when a master proceeds carelessly, and afterward circumstances arise when it is too late and impossible for him to do what is fit and proper to be done.”

Even if we take the SAKITO’s alleged 6 mile speed as literally accurate, she was negligent by all standards of safe navigation in the manner and the speed at which she was proceeding. Her evidence even shocked her own expert, Captain Arthur, whom counsel evidently had not intended to be examined on that aspect of the case.

This witness was given a hypothetical question, reconstructing the situation according to the SAKITO’s testimony. He testified [A. III, pp. 1234-5]:

“A. In that case, if I had a fix an hour before, I would just keep feeling my way on up to the break-water.

The Court: What do you mean by feeling your way? A. Go slow, or stop and listen, and keep on going a little more, feeling as I went along.

Q. How fast do you travel when you say you feel your way? A. Two or three knots an hour at the most, maybe stopped most of the time.

Q. In other words, it is dangerous to proceed under those circumstances? A. That’s right. You must keep your ship under control at all times.

Q. Would you say that six knots an hour would be pretty fast under those circumstances? A. I would, yes.”

Counsel's "mistake in judgment" theory is ingenuous, but it is just the old "didn't know it was loaded" excuse. The conduct of the officers is not to be tested by their own judgment, but by the standards of reasonable men. The trial court shortly disposed of the argument by the quotation from *The Germanic* (*Oceanic Steam Navigation Co. v. Aitken*), 196 U. S. 589, 25 S. Ct. 317, which appears at A. I, pp. 122-3.

It is also argued (Br. pp. 35-40) that the rule of sight does not apply when the other vessel does not cooperate in her own navigation and in the giving of signals. The rule of sight, of course, contemplates that the other vessel shall also obey the law as to speed and probably as to sound signals. But the OLYMPIC was not making speed. She was anchored. And, assuming her failure to give proper sound signals would excuse the SAKITO from compliance with the rule of sight, we have ample evidence and the trial court's finding that she *did not fail* in that respect and *was* sounding proper signals.

Of course, the actual visibility was very much greater than the 200 meters claimed by the SAKITO. So also was the SAKITO's speed greater than the 6 to 6½ miles per hour claimed by her witnesses. The trial court found her speed to be "at least 8 miles per hour" when she sighted the OLYMPIC at 7:09, and pointed to other evidence from which that figure was said to be conservative. [A. I, pp. 123-4.]

A number of witnesses with sea experience, qualifying them to judge the speed of moving vessels, saw the SAKITO approach the OLYMPIC and estimated her speed variously from 9 to 12 miles per hour. The trial court, however, preferred to take the evidence of the SAKITO's own navi-

gation and engine room records, which indicate that at 7:09 the SAKITO was moving at approximately 12 miles per hour.

By the SAKITO's own navigation fixes, duly pricked down on her working chart, her 7:00 A. M. position was just two miles from the OLYMPIC's position at anchor. [Sakito's Ex. K, A. III, p. 1164.] We had Captain Sato fix on the chart, by dead reckoning, her positions at 7:03, when she slowed her engines, and at 7:06, when she had fully decelerated her speed through the water to $6\frac{1}{2}$ knots. The position at 7:06 was $\frac{3}{4}$ of a mile from the OLYMPIC's position, and she covered that 4560 feet (less 200 meters or 650 feet) between 7:06 and 7:09. Her speed during that time must have been 1300 feet a minute or close to 13 miles per hour. We grant the possibility of reasonable error in getting the 7:00 A. M. position from a beam fix on Catalina Island South Light at 6:00 A. M., but the error, if any, might as easily work against the SAKITO's contentions as for them. The court made due allowances for such error in the SAKITO's favor when he found her speed to be 8 miles per hour at least.

Her engine room records also contradict her testimony that at 7:03 her engine speed was reduced to 50 revolutions per minute, and that they were turning at 50 revolutions at 7:09. Readings from her revolution counters, taken during the 12:00 to 4:00 watch, while the vessel was making her steady full speed of 16 miles, show an average of 117.7 per minute. She maintained the same engine speed during the next watch until 7:03, when the engine speed was reduced. She ran at reduced revolutions until 7:09, when she sighted the OLYMPIC and her engines were reversed. A record of the reading of the

revolution counters was taken at 7:09. From this we computed that between 7:03 and 7:09 she turned 501 revolutions at reduced speed or an average of 83.5 per minute.

Counsel for SAKITO do not dispute these calculations, so we have not set them out at length. They say, however, in the footnote on page 63 of their brief, that "nice calculations based on a fix 65 minutes earlier" should not be considered in determining either her 7:03 position or her speed thereafter. But, as we have said heretofore, the fixes and positions are the SAKITO's own, and granting the possibility of reasonable error in the 7:00 A. M. position, the court gave the SAKITO the benefit of the assumption that the error was in her favor.

It is said that the SAKITO was proceeding into a head wind, force 1, and the tide was affecting her. Force 1, according to the Beaufort Scale, is from 1 to 3 miles per hour, and is not sufficient to move a wind vane. The direction of the wind is only shown by smoke drift. (Knight, Modern Seamanship, 10th Ed., p. 673.) The tide or currents, if any, on the open ocean were just as likely to work with her as against her.

We think the trial court was generous with the SAKITO in finding that her speed at 7:09 was 8 miles per hour at least, and certainly it cannot be said that that finding is not fully supported by the *weight* of evidence.

The SAKITO has not furnished us with any figures as to her stopping abilities at a speed of 8 miles or more, but it is elementary that stopping distances increase in proportion as speed increases. At 8 miles or better the picture is all the worse for her. Whatever the actual

visibility was, the SAKITO could not stop or otherwise avoid collision in the distance she *did* see ahead, which brings us again to one of two inevitable conclusions,—immoderate speed or faulty lookout.

D. THE SAKITO MARU'S LOOKOUT.

We think that whatever the SAKITO speed was, she could have stopped or at least maneuvered so as to have avoided collision with the OLYMPIC if anyone on board had been keeping any kind of watch. The trial court found the visibility to have been 1800 feet, which is over three and one-half of the SAKITO's own lengths.

We have seen also that the OLYMPIC's bell was audible for more than half a mile and was being sounded in regular peals of five seconds duration, each minute. The other barges also were ringing their bells.

The trial court found as to the SAKITO's lookout:

"The 'Sakito Maru' is charged with the fault of not having an effective lookout. The evidence as to whether or not a lookout was posted at her bow is very conflicting, but I am accepting the testimony of those on board of the 'Sakito Maru', that a lookout was on duty. I appreciate the fact that many witnesses testified that they saw no lookout, but I am inclined to accept the positive in place of the negative testimony.

But in view of my findings heretofore expressed on the visibility, it is quite apparent, that the lookout was a lookout in name only. He was charged with the responsibility of seeing that which was within his vision. This he failed to do. If he had been an efficient lookout, the collision easily could have been avoided and this failure of the lookout must be

charged as a gross fault against the 'Sakito Maru'. (The Catalina, 18 F. Supp. 461 and cases therein cited.)" [A. I, p. 124.]

We must accept the court's finding that a lookout was posted on the SAKITO's forecastle head, but it is evident that the court felt the matter was left in some doubt. The lookout has told us that he was standing on a platform at the meeting of the bow plates and that the bulwarks came about to the height of his navel., [A. II, p. 953.] His head and shoulders, and most of his torso. would project above the bulwarks. Half a dozen witnesses had a clear view of the SAKITO's bows as she approached the OLYMPIC, of which several were experienced seamen who knew where a lookout should be posted and were consciously looking for him. [Grothe, A. I, pp. 431-2; Jones, A. II, p. 486; Harris, *id.* pp. 515-6; Johnson, *id.* p. 561; Walters, *id.* p. 652; Stiles, *id.* p. 737.] It seems to us that this is positive, not negative, testimony, for if the lookout had been posted as claimed these witnesses could not possibly have overlooked him.

But, accepting the finding that he was properly posted, it is obvious that he was of no more use as a lookout than a wooden figurehead. When he first saw the OLYMPIC she was so close that he could see people fishing on her deck. That is about all he did know. He did not know how far ahead the OLYMPIC was or how long it was between seeing her and the collision, and he did not hear any bells until after he saw the people on deck. [A. II, pp. 947-954.] The watch officers were equally incapable of seeing what was to be seen or hearing what was to be heard. Although their position was possibly less favor-

able for observation than that of the lookout, they knew that they were very close to the entrance of the harbor and should have been acutely conscious of the possibility of encountering anchored or moving vessels in the fog.

We submit, it is unescapable from the evidence that all those keeping watch on the SAKITO's bridge and fore-castle head should have heard the OLYMPIC's bell at least a half mile away, and should have seen the OLYMPIC and ascertained her condition at least 1800 feet or within four of the SAKITO's lengths.

We know that they did not see or hear her until $1\frac{1}{2}$ minutes and 650 feet before the collision. That time is fixed by the start of her admitted swing to starboard. Many witnesses on other vessels saw and heard the SAKITO minutes before that turn was initiated.

Said the United States Supreme Court in *The Colorado*, 91 U. S. 692; 697:

“Lookouts are valueless unless they are properly stationed and diligently employed in the performance of their duty; and if they are not, and in consequence of their neglect, the approaching vessel is not seen in season to prevent a collision, the fault is properly chargeable to the vessel and will render her liable, unless the other vessel is guilty of violating the rules of navigation.”

When those on a vessel do not hear fog signals properly sounded, the presumption is to be indulged that they were not attending strictly to their duties.

The Lutchet Brown (C. C. A. 5), 41 Fed. (2d) 176.

Counsel make little or no attempt to defend the SAKITO's incompetent lookout, saying merely that the finding must fall if visibility is determined to be approximately 200 meters. (Br. 58.)

“Every doubt as to the performance of the duty (lookout) and the effect of non-performance should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.”

The Ariadne, 13 Wall. 475; 20 L. Ed. 542.

The SAKITO, we submit, did not even begin to sustain the burden.

E. THE SAKITO MARU'S MANEUVERS.

Counsel say that the maneuvers of the SAKITO before the collision and after the OLYMPIC was sighted were skillful and in accordance with the practices of good seamanship. (Br. 64.)

They could not very well have been worse! Confused and bewildered when the OLYMPIC was sighted near the SAKITO's course, the SAKITO's master did exactly the wrong thing. He put his rudder to starboard instead of to port, turned directly into the OLYMPIC instead of away from her, and practically cut her in two, instead of striking a glancing blow with the bluff of the SAKITO's starboard bow. Error *in extremis* no doubt, but one which was directly brought about by the high speed and the deficient lookout, who failed to discover the OLYMPIC in time for considered and intelligent navigation.

The SAKITO's testimony that OLYMPIC, when sighted, was dead ahead and at right angles to the SAKITO's

course, is demonstrably false. She might have been dead ahead or nearly so, but the angle of the approach was far from a right angle. Most of the observers in a position to see stated that she came up on the OLYMPIC's port quarter, and the angles of impact, as measured by Mr. Alderson, Lloyd's surveyor, show that even after the SAKITO's ten degree turn to starboard she struck the OLYMPIC at least eleven degrees short of a right angle. [A. III, p. 1385.] But the admitted headings of the two vessels are sufficient to show the angle of the SAKITO's approach. Her course was 340° true. The OLYMPIC's heading was due west magnetic or 285° true, subject to the possibility of a swing of one point either way due to the slack of the stern anchor chains. The angle of approach was therefore between 45° and 65° of the OLYMPIC's heading.

It is perfectly plain to anyone with the most elementary knowledge of how a ship handles that if the SAKITO, on her course of 340° true, had been proceeding at a reasonable speed under existing conditions, and had sighted the OLYMPIC 1800 feet away, she should easily have avoided the OLYMPIC by a hard left rudder, with yards to spare. (See the turning curves in Admiral Knight's *Modern Seamanship*, 10th Ed., p. 502.) There would have been ample time so to avoid her, even after observation and reflection. But, as Captain Sato did not become aware of her presence until that distance had shrunk to a good deal less than half, he did not have time for either observation or reflection. He did not even determine her heading or whether or not she was moving or anchored, until after he had "instinctively" ordered "hard right" and turned the SAKITO toward instead of away from

the OLYMPIC. [A. III, pp. 1228; 1237.] He always has a "policy" to go to the right. [*Id.* p. 1119.] If so, it is a very bad policy when he does not even know the *heading* of the other vessel. We have that policy to thank, as well as the excessive speed and deficient lookout, for the loss of the OLYMPIC.

We do not mean to say that when nothing was done until the vessels were only 200 meters apart, a turn to port instead of to starboard would necessarily have avoided the collision entirely, but it would very nearly have done so and, at worst, there would have been only a sideswipe or a glancing blow.

We should observe at this point that we twice demanded the production of the plots of the SAKITO's turning curves. The first time was upon the taking of Yokota's deposition when the SAKITO was in Los Angeles. The second time was at the trial, when counsel replied that it was aboard the ship and that he did not consider it a matter of major importance. [A. III, pp. 1122, 1124.]

It is urged, in effect (Br. 68), that nothing should be considered in this case but the judgment of Captain Sato, whose training, qualifications and experience are highly vaunted. It does not seem to us that his performances in this situation come up to his press notices. We submit, with all confidence, that the SAKITO's faults in immoderate speed, inadequate lookout and in improvident maneuvers after the danger was tardily discovered, are established by the great weight of the evidence, and of themselves fully and completely account for the collision and its consequences.

II.

Faults Charged Against the OLYMPIC II.

A. OLYMPIC II'S PLACE OF ANCHORAGE.

The OLYMPIC's place of anchorage was 3.2 miles to seaward of the Los Angeles Breakwater, bearing 160° true from the light. That is close enough for any purpose of this case, for any criticism of her position which can be made would apply equally to any other position within the radius of a mile.

That she was clear out on the open sea is apparent from any chart. There was no channel, or shoals or range courses within miles of her, and the ocean was absolutely unobstructed. The point of her anchorage was within United States territorial waters in the sense that she was less than 3 miles to seaward of a line drawn from Point Firmin to the now obliterated Point Lasuen, (*United States v. Carrillo*, 13 Fed. Supp. 121), but none of the area to seaward of the breakwater had ever been prohibited for anchorage. Since the collision happened a large area has been established as a defensive sea area, and is so marked on some of the charts used in evidence. [See Charts at A. II, pp. 982, 1056.] That area was established sometime in 1941, and is purely for purposes of national defense.

The OLYMPIC was anchored on a deep lying reef known as Horseshoe Kelp, which is one of the best known and longest used ocean fishing grounds on the Southern California coast. It is a place of resort for fishing craft of all kinds and, day and night, in season and out, fishing vessels from the size of the OLYMPIC down to small launches fish there at anchor and drifting. On Sundays

and holidays during the sport fishing season they run into the hundreds. Fishing barges like the OLYMPIC have anchored there during the summer season for years. The trial judge recalled that he had fished from a barge on Horseshoe Kelp twenty years before the trial. [A. III, p. 1396.] Almost every local witness who was called by either side testified as to the fishing activities on Horseshoe Kelp and their continuous existence for as long as the witness had lived in Los Angeles. Captain Arthur, SAKITO's expert witness, testified that it was notorious to mariners visiting the port that there was a fishing ground at that point, and that fishing barges were generally anchored there. [A. III, pp. 1336-8.]

The area generally is that in which vessels bound to or from the south pick up and drop their pilots, and where, inbound, they must anchor and wait for a pilot. The pilots meet them from one to six or seven miles off the breakwater, although generally much nearer to the breakwater than the position of the OLYMPIC. [A. II, pp. 635-6.]

Vessels approaching Los Angeles from the south, particularly if they do not call at San Diego, pass close to Horseshoe Kelp and sometimes even over it. They frequently passed close to the anchored barges, sometimes to the eastward and sometimes to the westward. The Coast Pilot recommends that vessels approaching Los Angeles in a fog and unsure of their position steer well to the eastward of the breakwater and come in on the 10 fathom curve. (Coast Pilot, 1934 Ed., p. 28.) Any vessel following this direction would pass the fishing grounds miles to the eastward. [See 10 fathom curve as plotted on chart at A. III, p. 1056.] But northbound vessels which

proceed straight for the breakwater, from a departure point outside of the Coronado Islands, will often pass closs to Horseshoe Kelp.

The ocean area in the Gulf of Catalina and San Pedro channel is constantly patrolled, and traffic therein closely supervised by the Coast Guard. Assuming that Horseshoe Kelp is within territorial waters, under the decision in *United States v. Carrillo* (*supra*), the Secretary of War has authority to close the area to anchorage if fishing therein is deemed a hazard to navigation. (33 U. S. C. A. 1.) The area was never so closed and, unless the toe of the shoe falls within the newly established Defensive Sea Area, it is not closed to anchorage now.

The trial court found that the OLYMPIC was anchored on the open sea and not in the vicinity of any channel or fairway, but was surrounded by miles of navigable water. [A. I, pp. 114-5.] It held that the place of anchorage was proper and permissible, and that the OLYMPIC was not anchored there in violation of the statute (33 U. S. C. A. Sec. 409), which only prohibits anchorage in a navigable channel when it prevents or obstructs the passage of other vessels, which the OLYMPIC did not do. [*Id.* pp. 127-8.]

The facts above recited are undisputed, and the court's holding is in accordance with all authority.

Counsel for the SAKITO bitterly scold at the OLYMPIC and the two other barges for conducting their operations on Horseshoe Kelp, saying that they were "purprestures" (a frightening word) across the path of vessels bound for Los Angeles; that they converted a portion of the sea lane into a "private anchorage ground" (Br. 22);

that they, *with their anchor chains*, created an obstruction directly across the steamer lanes extending for half a mile (Br. 22; 28); that they and the OLYMPIC obstructed a navigable channel in violation of the anchorage statute (33 U. S. C. A. 409); and that quite apart from the statute the OLYMPIC was a "maritime nuisance." (Br. 32.)

Counsel are entitled to some hyperbole in argument, but when imagination soars to the height of visualizing two relatively small vessels abreast and another 1600 yards astern as an obstruction extending for half a mile, one must cry a halt. Anchor chains do not float nor, on a windless, tideless sea, do they stretch like a taut clothes-line between anchor and ship. If the author of the SAKITO's brief will look at the photographs of the OLYMPIC which are in evidence (OLYMPIC's Exs. 1 and 2) he will discover how a vessel's anchor chains lead from hawse pipe to bottom, and discover that the anchors and chains of the barges added very little to the length of the vessels in the way of an obstruction to navigation.

Upon the authority of *Eastern Transportation Co. v. United States*, 29 Fed. (2d) 588 and *The Lehigh*, 12 Fed. Supp. 75, counsel assert (Br. 32) that a "navigable channel," within the meaning of the anchorage statute, applies to any navigable waters of the United States, including, apparently, all coastal waters to the three mile limit, whether in or near a harbor or not. That is a severe strain on the language of the cases, but it is easier to accept that construction than to take space to contradict it. By hypothesis then, the OLYMPIC's position three miles from the Los Angeles Breakwater was in a "navigable channel" about twenty miles wide. Counsel say,

therefore, she obstructed that channel, as denounced by the anchorage statute.

The statute (33 U. S. C. A. 409) has a dual aspect. It prohibits anchorage in navigable channels which prevents or obstructs the passage of vessels, and it makes unlawful (unqualifiedly) the failure to mark a wreck sunk in a navigable channel. We are hardly concerned with the latter aspect, so that disposes of *Eastern Transportation Co. v. United States* (*supra*).

The anchorage aspect of the statute does not prohibit anchorage absolutely, but only where it *prevents or obstructs the passage of other vessels*. Of course, any anchored vessel obstructs passage to the extent of her physical bulk, but, as statutes are usually given a sensible construction, it has been held under this one that when a vessel anchors in a navigable channel, even a physically narrow one, she does not violate the statute if she leaves room so that other vessels, in the exercise of reasonable care, can get by her with convenience and safety.

The Virginia Ehrman, 97 U. S. 309; 314;

The Boston Maru (C. C. A. 9), 20 Fed. (2d) 508;

The Europe (C. C. A. 9), 190 Fed. 475;

The Bright (C. C. A. 4), 124 Fed. (2d) 45;

The Hesperos (C. C. A. 4), 265 Fed. 921;

The John G. McCullough (E. D. Va.), 232 Fed. 637;

Le Lion (E. D. Pa.), 84 Fed. 1011.

This court in *The Europe* (*supra*) said of a vessel anchored in the Willamette River near Portland:

“The argument based upon the first and third grounds, as stated above, is completely refuted by the decision of the Supreme Court in the case of *The Oregon*, 158 U. S. 186. On the authority of that case, we hold the law to be settled that an ocean-going vessel may lawfully lie at anchor in the nighttime in the deep channel of a navigable river, if not so placed as to prevent or obstruct the passage of other vessels, in violation of the act of Congress prohibiting such obstruction. (Citing statute.) We also hold that the words ‘prevent or obstruct’, in this statute, are positive words indicative of limited restraint and of legislative intent to not interfere with the right use of waterways by imposing an absolute or unreasonable prohibition; . . .” (p. 478).

In *The Virginia Ehrman* (*supra*) the Supreme Court applied the same rule to a dredged channel only a few hundred feet wide. In *The Boston Maru* (*supra*) the situs was the lower Columbia River; others were channels in Chesapeake Bay and Delaware Bay, which were four miles or more wide. In *The Bright* (*supra*), about the last word on the subject, the court said:

“If a vessel anchors at a point in the channel where, notwithstanding such anchorage, other vessels navigated with the care the situation requires can safely pass, then she has neither violated the statute nor rendered herself liable under the general rules applicable to navigation, even though she has to a certain extent obstructed the channel.” (p. 46).

The statute, carried to the extent urged by counsel, would prohibit a vessel anchoring anywhere within the

three mile limit, and would be a monstrous absurdity. We have never seen a case where a vessel was held in fault for a violation of this statute unless she was physically blocking a channel or harbor entrance, or a range course between aids to navigation. All of the SAKITO's authorities are of that character. (Br. 33.)

In *The Lehigh*, 12 Fed. Supp. 75, a tug with a tow nearly 3000 feet long anchored in a dense fog, within a half mile of the entrance to the 400 foot dredged channel leading out of Lake Erie into the Detroit River, with her tows tailing right across the entrance. The vessels were improperly lighted, had no lookouts and gave no warnings. The court found that, so anchored, the flotilla actually hindered and impeded navigation and was anchored in such a manner as to prevent or obstruct the passage of other vessels.

In *The Admiral Schley*, 131 Fed. 433, a tug with a long tow was "loitering" across the entrance to Boston harbor. Apparently she was held in fault for "loitering," as the court intimated that if she had been engaged in a passage she might have been within her right in crossing the harbor mouth.

In *The Persian*, 181 Fed. 439, there was a collision between a vessel anchored on a range course in a fog and a vessel picking its way between the range buoys and beacons, which were less than two miles apart. The area was full of shoals on both sides of the buoyed channel, and the moving vessel had to proceed by compass and lead with meticulous care, picking up and leaving each aid to navigation within a few hundred feet. The anchored vessel had found the going too difficult and, as she said, had moved a half mile into the open sea and

anchored. The trial court accepted this testimony and exonerated her. The appellate court reexamined the evidence and found that the anchored vessel had not moved off the range course, but was directly upon it. The appellate court said:

“Bits of testimony found here and there in the record indicate that navigators appreciate the importance of leaving the fairway on ranges unobstructed, where navigation is as confined as it is in this locality.” (p. 447).

The OLYMPIC was over three miles from the harbor entrance, she was not on or near a range course, and the only part of the ocean she obstructed was that covered by her own length and breadth. The SAKITO had the whole area between Catalina and the mainland in which to avoid her. The OLYMPIC was literally on the open sea.

Counsel for the SAKITO abuse the OLYMPIC and her owners for daring to anchor her on Horseshoe Kelp, as if she were some sort of outlaw. Their point of view is apparently that a fishing barge or a fishing vessel of any kind has no right on the ocean except by sufferance. Their attitude, we submit, is arrogant and childish. The OLYMPIC'S occupation was a humble one, but she had the same right to pursue it on the ocean as the SAKITO had to pursue hers. While Horseshoe Kelp may be near the steamer lanes, counsel fail to remember that it was there and the fish were on it long before there were any steamer lanes or any SAKITO. Steamers may go where they will, but a vessel whose occupation is fishing must go where the fish are.

It is no novelty for fishing banks to exist near the paths of commerce. The products of the great banks of the North Sea, the Adriatic and the North Atlantic are a vital food supply for the world and a source of employment for the seafarers of littoral nations. The fishermen of the world are protected in the right to pursue their occupation on the sea by international law.

“Sailing vessels under way shall keep out of the way of sailing vessels or boats fishing with nets, lines or trawls. This rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fairway used by vessels other than fishing vessels or boats.”

International Rules, Art. 26.

The Inland Rule is identical.

“This article is but a codification of the unwritten law of the sea prevailing before the present rules were formulated, that a free vessel must keep out of the way of fishing vessels or boats encumbered by having out nets, trawls or lines. The article makes mention only of the duty of sailing vessels in respect to other sailing vessels or boats fishing. The same duty, however, is imposed upon free steamers in respect to steam vessels fishing.

‘Fairway’, as used in this article, is clearly intended to signify narrow waters through which vessels must pass. It is not applicable to fairways in the open sea.”

LaBoyteaux, Rules of the Road at Sea, p. 167.

“Fishing boats have a right to fish on the high sea and to be fast to their nets, whether their fishing ground is in the track of ships or not. It is the

duty of other ships to take greater precautions when passing over a fishing ground, so as to keep clear of fishing boats and not make them cast off from their nets."

Marsden, Collisions at Sea, 8th Ed., p. 464.

In the following cases, moving vessels, steam and sail, have been held liable under Article 26 or by analogy to it, for running down vessels engaged in fishing:

The Albatross (C. C. A. 9), 20 Fed. (2d) 17;

The Virginia & Joan (C. C. A. 1), 86 Fed. (2d) 259;

The Marshall O. Wells, 172 Fed. 984; aff'd (C. C. A. 3), 178 Fed. 918;

The Jean Jadot (E. D. N. Y.), 2 Fed. Supp. 942.

In *The Marshall O. Wells* (*supra*), the court said:

"The proofs satisfy us that decedent's power boat was anchored for fishing in a proper place and in plain view of the approaching schooner; that there was ample fairway room for the latter to pass; that a horn was blown on the fishing boat as the schooner approached; that the power boat was in no fault; that the schooner could have seen the fishing boat and heard the horn in ample time to avoid the collision, had she had a lookout. By rule 26, providing that 'sailing vessels under way shall keep out of the way of sailing vessels or boats fishing with nets, or lines or trawls,' the schooner was in fault in making no effort to avoid decedent's fishing boat, which, as we have seen, left ample fairway space for the schooner." (p. 919).

The trial court held that it was "doubtful" whether the OLYMPIC could be classed as a fishing vessel within the meaning of Article 26 of the International Rules. [A. I, p. 128.] We do not see why she should not be so classed. She was certainly fishing and she certainly had lines out, as any lookout on the SAKITO, with eyes in his head, could readily have determined. But we do not press the point, for the duty was the same upon the SAKITO whether the OLYMPIC was a fishing vessel or merely an anchored vessel. She is obligated to keep clear of the former by international rule, and of the latter by the general law.

Whether the OLYMPIC was a fishing vessel, a pleasure craft or a maritime nondescript with no visible means of support, she had as much right to her share of the ocean as the proudest merchant vessel afloat, and was bound and protected by the same laws as was the SAKITO.

The SAKITO's whole case on the charge of improper anchorage consists of the opinions of Captain Sato (of the SAKITO), Captain Arthur and Monyhan, a coast guard boatswain. They testified that in their opinions the OLYMPIC's place of anchorage was dangerous, or dangerously close to the sea lanes.

Assuming that this was a proper matter for expert testimony, the trial court undoubtedly gave it the weight to which it was entitled and found that the place was a proper one notwithstanding. Sato's opinion was without any foundation of local knowledge and was worthless, biased or not. Captain Arthur, an undoubtedly honest and sincere witness, had only one point of view,—that of the commercial navigator. To him that was the only im-

portant use of the sea, and fishing vessels were “nuisances.” The boatswain, Monyhan, was undoubtedly called to suggest official disapproval of the OLYMPIC and her ilk. If such disapproval had existed in fact, counsel for the SAKITO would not have had to send across the continent for the testimony of a transferred warrant officer to voice it.

We do not have to excuse or apologize for the OLYMPIC’s place of anchorage, for she had the right to be there. We submit that any vessel is entitled to anchor and fish on any well established fishing ground at sea, and if she obeys the law and sounds the signals required of a vessel at anchor she is absolutely without fault. The trial court well said that to hold otherwise would preclude fishermen at any time from anchoring on the open, unobstructed ocean. [A. I, p. 130.]

B. THE OLYMPIC II’S SOUND SIGNALS.

The trial court held that the evidence was “overwhelming” that the OLYMPIC sounded proper fog signals, and in a previous subdivision we have summarized the evidence in support of that finding. That evidence fully disposes of what counsel term the “factual questions.” (Br. 19-22.) The signals given were those required by law. (International Rule, Art. 15 (d).)

The case was tried by both sides on the theory that the signals required of the OLYMPIC were those of a vessel at anchor, but we are now confronted with a new claim to the effect that the OLYMPIC should have sounded some other kind of signals,—those of a “moored vessel” or some signals “appropriate to her position;” or, being a fishing

vessel with lines out, she should have sounded the signals provided by International Rule, Article 9(i).

These points were not raised or pleaded at the trial or passed upon by the trial court, and are not covered by any assignment of error, unless assignment No. XII [A. I, p. 252] be deemed a catchall. The tardy raising of these points seems to bring them squarely within the rule that an appellate court will not consider points not raised in the court below.

The Golden Gate (C. C. A. 9), 52 Fed. (2d) 397, 399;

Anderson v. Alaska S.S. Co. (C. C. A. 9), 22 Fed. (2d) 532; 536.

But they are entirely lacking in merit. We know of no signal permissible for any vessel which is at anchor but the bell signals provided by Article 15(d). Counsel say that the OLYMPIC "was not lying at anchor," apparently because she had both a bow and stern anchor, and was held by the latter to a westerly heading. (It is also inferred that with her bow and stern anchor chains she was something over 1000 feet long.) The argument is, evidently, that she was a moored vessel and should have made some other sort of signals. Counsel do not say what sort of signals they think she should have given in that situation.

It has been held in the Second Circuit that vessels moored to the ends of piers in a fog must give some kind of signals, and, as counsel admit (Br. p. 24), the signal of an anchored vessel by bell is regarded as entirely sufficient.

The Youngstown, 40 Fed. (2d) 420, 421;

Wright and Cobb Lighterage Co. v. New England Nav. Co., 204 Fed. 762.

So, moored or anchored, the OLYMPIC complied with legal requirements.

We hardly need add that the OLYMPIC's anchor chains did not add very much to the obstruction created by her hull, nor are we greatly impressed by the suggestion that Mr. Johnson's fishline presented a 200-yard additional obstacle to an approaching vessel. (Br. p. 26.)

We know of no rule which prohibits a vessel from anchoring bow and stern, or which requires any vessel so anchored to give any special signal. Conceding the possibility that under some conceivable circumstances anchoring bow and stern might be imprudent seamanship, we can find no such circumstances in this case. And, assuming it were possible for her to have led the SAKITO into an erroneous assumption because she was headed west instead of tailing to the force 1 wind, she did not so mislead the SAKITO, for SAKITO's navigators did not see the OLYMPIC in time to be either led or misled. They did not claim that they were misled in any respect, and hardly could when they admit that they did not see or hear the OLYMPIC until the SAKITO was a bare 200 meters away from her. Captain Sato admitted that he did not even know *how* she was heading until after he had turned the SAKITO directly into her. [A. III, pp. 1226-29.]

As to the idea that the OLYMPIC should have sounded both whistle or horn *and* bell, as required by Article 9(i) (Br. pp. 25-6), it is fully apparent that Article 9(i) deals with fishing vessels under way or adrift. When a fishing vessel is *anchored* she gives the signals of an anchored vessel. Article 9(h) provides for the analogous situation when fishing gear is fast to a rock and the vessel becomes *stationary*. Then she is required to give the signals of a vessel at anchor.

We wish very much that counsel had told the court what permissible signal the OLYMPIC could have given which would have told the SAKITO anything more than the OLYMPIC's bell would have told her had she been listening for it. In the trial briefs, counsel argued that as soon as the SAKITO's first whistle had been heard, the OLYMPIC should have started and continued a steady clamor on the bell, and continued it up to the collision. That contention is not expressly pressed now, but if that is what counsel mean by sounding a signal "appropriate to her position", there is a very short answer to it.

The law requires fog signals by whistle and bell to be made at intervals. The purpose is obvious. If, upon the hearing of a fog signal every vessel in the vicinity sent up a clamor of constant noise, nothing could be intelligently interpreted. The giving of unorthodox signals, except *in extremis*, was fully considered in *The Oregon*, 158 U. S. 186; 202-3, and in *The Admiral Schley* (C. C. A. 1), 131 Fed. 433; 437.

It is submitted that no legitimate criticism can be made either of the signals which the OLYMPIC gave or her manner of giving them.

C. THE OLYMPIC II DID NOT "GIVE CHAIN" OR CAST OFF HER ANCHORS.

This claim of fault was not pleaded or referred to in the trial court nor is any assignment predicated upon it. It never occurred to any of the SAKITO's witnesses nor to the very resourceful proctor who tried the case for SAKITO that there was any remote possibility of the OLYMPIC doing anything to avoid collision in this regard. Yet, in their brief here, the SAKITO's counsel persistently insinuate the idea that the OLYMPIC was at fault for not

acquiring sudden powers of locomotion or levitation and removing herself from the SAKITO's path. (Br. pp. 25; 36; 37; 45.) On the latter page it is said that the OLYMPIC's "fundamental fault" was in her general unpreparedness to *remove herself* or to take steps in avoidance of anticipatable dangers in fog.

The OLYMPIC was anchored on a calm sea, with a wind hardly capable of filling a small boat's sail. (We wonder where counsel got the Beaufort Scale which shows force 1 as approximately 7 knots per hour. (Br. p. 5).) This wind (from the northeast) and the tide which, if it were perceptible at all, was running seaward, could not have moved the OLYMPIC any perceptible distance in five or ten minutes, and, assuming they would move her at all, it could only be in one direction—*toward* the approaching SAKITO.

So, if the OLYMPIC had been able, in a flash, to free herself from her anchors and chains when the SAKITO came in sight, there was no conceivable chance for her to have avoided the oncoming vessel, and if any significant drift were possible, it would only have taken her toward the SAKITO and shortened, to a microscopic extent, the distance within which the SAKITO could have avoided her.

There are cases such as the two cited in the SAKITO's brief, page 25, where powered vessels have been held in fault for failing to give chain or come up on their anchors to avoid a vessel dragging or drifting down upon them, but we have never heard of a vessel which was held in fault for failing so to avoid a vessel which turns toward her at an eight-mile speed, a few hundred feet away. It was certainly not a fault that the OLYMPIC was not a powered vessel, and without power and the opportunity to use it she could not have budged from her place. Even if

she had been fully powered and ready to use it, it would have been impossible for her to get under way in the time available.

Interlake S.S. Co. v. Great Lakes Trans. Co. (C. C. A. 2), 89 Fed. (2d) 694, 696.

D. THE OLYMPIC'S LOOKOUT.

The gist of the criticism of the OLYMPIC's lookout (Br. pp. 41-5) seems to be that counsel do not like him and that he was a bad witness. Counsel say (*id.* pp. 41-2) that in the OLYMPIC's situation there was nothing a lookout could do but give proper signals and more vigorously employ them when danger approached. The evidence shows conclusively and the court found that Ohiser, the lookout, did exactly that and did it beyond criticism. Yet counsel go on for four printed pages, blackguarding Ohiser for everything else under the sun, without a single suggestion as in what respect, if any, they claim he failed as a lookout.

We can find nothing inconsistent with the fact that Ohiser faithfully discharged his duties as lookout, in the assertion that he worked overtime to help his shipmates out, or that he had his breakfast at 6:30, or that he thought he heard a ship's propellers, or that he could not accurately estimate time or angles, or that he did not time his bells with a stopwatch or that he stopped ringing them when it was not foggy. Granting that he was a bad witness and easily confused, the manner of performance of his duties did not depend on his testimony alone. It was fully corroborated. The trial court was well aware of his deficiencies as a witness and made full allowance for them.

The evidence is clear and overwhelming that he was on lookout and paying exclusive attention to looking out

at all times after 6:45 or thereabouts, and was ringing the regular peals required by the statute, without cessation, until the SAKITO turned toward the OLYMPIC. Then he rang a steady alarm peal until he was literally driven from his post by the SAKITO's prow. He heard what must have been the first of the SAKITO's fog whistles and was keeping close watch to seaward when he saw her take shape out of the mists, evidently at about the same time she was seen by Johnson, fisherman on the OLYMPIC, and Grothe and Walters on the MAR-ELL. That was as soon as anybody could see her. What more could be asked of the most competent lookout in a like situation?

Counsel say that the duties of lookout must be undivided, citing the familiar *Ariadne* and recent decisions by this court. (Br. p. 43.) We presume counsel refer to the fact that Ohiser was the bell ringer as well as the lookout. The stern burdens of the *Ariadne* rule are not, we think, to be applied literally in the case of a vessel at anchor and incapable of movement; but, assuming they are, wherein did Ohiser fail? And unless our sea lore is very much out of joint, the anchor watch on most vessels combines the duties of lookout and bellringer, and on sailing vessels the lookout always blows the fog horn. The two duties are not inconsistent or diverting, for the bell ringing and horn blowing are purely mechanical and do not interfere with a constant and ceaseless vigilance.

But assuming that Ohiser had dual duties, it certainly cannot be a culpable fault when both were discharged with 100 percent efficiency. Thus, in *The Nacoochee*, 137 U. S. 330; 341, the Supreme Court held (reversing a contrary judgment below) that where a sailor on a sailing vessel was acting as lookout and blowing the fog horn, and performed both duties properly, there was no fault.

This court has held that the lookout on a moving powered vessel must be free and single minded. (The *Koyei Maru*, 96 Fed. (2d) 652-654.) Assuming that a vessel at anchor must comply with the same standard, we submit that Ohiser as lookout fully complied with that standard, and the mechanical act of ringing the bell did not impair his efficiency.

The burden of proof was and is on the SAKITO to show that Ohiser was not a competent lookout and did not exercise the diligence the situation required. She must show, therefore, that he lacked attentive watchfulness.

The Catalina (C. C. A. 9), 95 Fed. (2d) 283; 285.

She failed to sustain that burden, and the evidence is overpowering that the OLYMPIC's lookout did everything that the most expert lookout at sea could have done.

E. "UNSEAWORTHINESS" OF OLYMPIC II.

The SAKITO claims that the OLYMPIC was guilty of certain statutory and rule violations with respect to certificated personnel and compliance with alleged "requirements" of the local inspectors, that she have an indefinite number of thwartship bulkheads. (Br. pp. 46-56.) By no stretch of the imagination did these factors, if existent, have anything to do with the collision, but if counsel can pin some statutory or rule violation upon the OLYMPIC they hope to get her under an impossible burden of proof under the rule of *The Pennsylvania*, 19 Wall. 125.

It is first claimed that the OLYMPIC was incompetently and inadequately manned because she was a "seagoing barge" and failed to have 65% of her deck crew able seamen, as required by the *La Follette Act*, as amended. (46 U. S. C. A. 672 b, c.)

This statute, by its terms, does not apply to unrigged vessels, except seagoing barges, and the trial court held that the OLYMPIC was not a seagoing barge within the meaning of the Acts of Congress. We shall discuss that holding a little later.

The cardinal condition precedent to any holding based upon a statutory violation is proof that the statute was violated. That burden was plainly upon the SAKITO and she did not sustain it.

First, there is no proof that the OLYMPIC's crew did not comply with the statute. Ohiser testified that he had only ordinary seaman's papers, but there was no proof that Culp and Greenwood did not so comply. Counsel say "no showing is made" that Culp and Greenwood had any certificates, and that is literally true. Neither is there any showing that they did not. Captain Andersen testified frankly that he did not know and had not inquired whether or not they had papers or what they were. [A. I, p. 386.] But that is as far as the SAKITO went with the matter. The trial court made no finding that they did not have able seamen's certificates, and could hardly have done so in the state counsel chose to leave the record. A violation of the statute cannot be presumed and must be proved.

Second, assuming that at the time of the collision none of the three men on board was an able seaman, that does not constitute a violation of the statute. The statute provides that no vessel . . . shall be permitted to *depart from any port of the United States* . . . unless 65 per centum of her deck crew . . . are of a rating not less than able seamen. The only time the OLYMPIC ever departed from a United States port was when she left Los Angeles Harbor in May four months before the

collision. There is evidence that at that time she had a different personnel, and there is no showing that any or all of them were not able seamen. Again, violation of the law cannot be presumed. If there is any presumption, it is that the law was obeyed.

The trial court found on this issue that, without determining that the involved statute was applicable to the OLYMPIC, it was sufficient to say that "by no stretch of the imagination" did the lack of certificated personnel contribute to the collision or the resultant damage or loss of life. [A. I, p. 130.] There was a factual finding which cannot be disputed *on any phase* of the evidence.

The OLYMPIC's crew, certificated or not, did everything which could possibly be demanded by the most exacting tribunal, and counsel, with all their ingenuity, are unable to suggest a single respect in which this crew demonstrated incompetency. The evidence showed that proper sound signals were given, a competent lookout was kept, and when the OLYMPIC received her death blow these three men acted as coolly, efficiently and as heroically as could be expected of any crew afloat. Counsel do not and cannot point to a shred of evidence which is remotely contrary to the court's finding that the statutory violation (if it existed) could not have had contributive effect.

It is also claimed that the OLYMPIC, as a seagoing barge or as a vessel of over 100 tons carrying passengers, was subject to inspection by the Bureau of Marine Inspection and Navigation. (She had no current certificate of inspection at the time of collision because of reasons which will presently be set forth.) So, say counsel, she violated 46 U. S. C. A. 398, providing that if any seagoing barge be "navigated" without a certificate of inspection the owner

shall be liable for a penalty of \$500.00. Counsel also refer to "requirements" of the local inspectors, relating to transverse bulkheads, and seek to leave the impression that in failing to comply with these requirements the OLYMPIC was guilty of violating a rule having the force of a statute.

As a background for further discussion, the court should have the picture of the factual situation as to inspection of these pleasure fishing barges:

Evidently the use of anchored vessels for this purpose is peculiar to the waters of the Southern California area. They began operations many years ago, and by 1940 there were from a dozen to twenty of them operating in coastal waters from Santa Barbara south. No one considered that they were subject to inspection and, indeed, the local inspectors would have nothing to do with them. In 1934, when the OLYMPIC was put into service, her owners applied for inspection and were told that none was required. About 1936, and about the time of the advent of the gambling ships, the Bureau decided that it had the power and duty to inspect pleasure barges. The OLYMPIC's owners promptly applied for inspection; she was inspected and received certificates of inspection for the years 1936, 1937 and 1938. The inspection for the latter year was just completed and the certificate issued when it was recalled by the inspectors, who, at that time, claimed that the barges had to comply with the load line act. The OLYMPIC duly surrendered her certificate. Later the Bureau decided that load line regulations did not apply and advised the OLYMPIC's owners that nothing would be done by way of inspecting the fishing barges until some contemplated new regulations were promulgated. There the matter rested until the summer of 1940, except that in

1939 the inspectors requested the OLYMPIC's owners to furnish a description and plans of the vessel, which were prepared and furnished and are in evidence as OLYMPIC's Exhibit 3.

In June of 1940 the local inspectors at Los Angeles addressed to the barge owners, including the OLYMPIC's owner, a letter stating that non-self-propelled vessels anchored on the seas were subject to inspection under the sea-going barge statute (46 U. S. C. A. 395), and that there was "submitted" an outline of the general requirements to be complied with. This outline was a mimeographed document of several pages, containing all sorts of structural and equipment specifications, set forth under forty-two heads. [A. I, pp. 390-401.] The OLYMPIC's owners addressed an appeal or protest to the director of the Bureau [A. II, pp. 789-792], which was denied. [*Id.* p. 744.] Thereabouts there were some conferences with Captain Fisher, the Supervisory Inspector, who informed the OLYMPIC's people that he was coming to Los Angeles shortly and they might be able to work out something. [A. I, p. 403.] We understand Captain Fisher was in San Pedro at the time of the collision, but had not gotten around to seeing Captain Andersen.

It is evident that, assuming the Bureau believed the new regulations were valid and within the power of the local inspectors to make, it did not, up to the time of the collision, consider that they were in effect nor had it made any attempt to enforce them. In a letter from Captain Fisher to the SAKITO's counsel, written during the trial and admitted in evidence [A. III, p. 1060], Captain Fisher said he "did not find any record" of a relaxation of the requirements of June 1940, and "had no recollection" of

granting a relaxation of these requirements. But this very negative statement was completely discredited by a letter from Commander Field, head of the Bureau of Marine Inspection and Navigation, to the Secretary of Commerce, which accompanied the report of the "A" Board which investigated the collision. This letter [A. III, pp. 785-7] concludes:

"It was not deemed equitable, however, to require that the vessels immediately comply with the rigid requirements of inspection, and, therefore, the owners were given a reasonable length of time in which to comply with the requirements placed upon them. This was true in the case of the 'OLYMPIC II'." (p. 787).

As a matter of fact the purported regulations of June 1940 were *never* adopted by the Board of Supervising Inspectors or approved by the Secretary of Commerce, and the local inspectors never attempted to put them into effect. The fishing barges in Southern California waters continued to operate without inspection until after Pearl Harbor, when all activities outside the harbors were suspended by order of the military authorities.

Evidently both the inspectors and the barge owners were marking time and awaiting the outcome of a test case filed in the Southern District to ascertain if the fishing barges were subject to inspection at all. This suit was filed by the United States against the owners of the vessel KOHALA to recover the \$500.00 penalty prescribed by 46 U. S. C. A. 398, requiring seagoing barges to have a certificate of inspection while being navigated. This case was pending at the time of the trial herein. In January 1942 Judge Beaumont decided the case and held that, assuming without deciding that the barges were

“seagoing barges” within the meaning of 46 U. S. C. A. 395, they were not “navigated” within the meaning of Section 398, while lying at anchor and serving their patrons as fishing platforms.

United States v. Monstad, 1942 A. M. C. 273.

As far as we can learn this decision has not been appealed.

The trial court in this case held that the OLYMPIC was not a “seagoing barge” within the meaning of Section 395. [A. I, pp. 133-6.]

The question of whether these barges or vessels are subject to inspection or not has always seemed to us an academic matter as far as this case is concerned, and we did our best to keep out of the controversy. It has always been our view and that of the OLYMPIC’s owners that if the barges were not subject to inspection, they certainly ought to be. The OLYMPIC’s owners did everything short of mandamus proceedings to get the inspectors to inspect and certify the vessel, and while they did protest against the regulations purportedly promulgated by the local inspectors in June 1940, it was only on the grounds that they were unreasonable, prohibitive and confiscatory. They did not at that time realize that the so-called regulations were utterly void and *ultra vires*.

It was our theory of the case that, as far as inspection itself was concerned, the matters of whether or not the OLYMPIC had been currently inspected, or at the time of the collision did or did not have a certificate on board, were absolutely immaterial, and the lack of inspection or certificate *per se* could not conceivably have affected the collision or its results. We were concerned only with

establishing that the OLYMPIC actually complied, as to bulkheads and other equipment, with the existing requirements of statute and the Rules of the Supervising Inspectors pertaining to any class of inspected vessels into which the OLYMPIC might fall. This proof was plain and undisputable, so time and again during the trial we declined to advocate the proposition that the OLYMPIC or her business did not come within the inspection laws. However, after submission of the case the trial court requested our assistance on the question of whether the OLYMPIC was subject to inspection as a seagoing barge or otherwise, and we presented the material we were able to find on those points.

We believed then, as we do now, that it is absolutely immaterial to this case whether the OLYMPIC should or should not have been inspected, but if the point is to be considered at all we owe it to the trial court to present the same material in defense of its holding. As this material is somewhat long, we are putting it in an appendix hereto, in the identical form it was submitted to the trial judge.

As far as the so-called requirements of the local inspectors are concerned, we hardly need argue that they were *ultra vires* and of no legal effect. In substance these regulations purported to create a new class of "seagoing barges" and to prescribe for them by general rule, without regard to the condition or structure of any particular vessel, revolutionary structure, equipment and manning requirements which had no possible authority or justification in law. No power exists to promulgate general rules and regulations governing the structure and equipment of a class of vessels or as to the standards of inspection but in Congress or the Board of Supervising Inspectors,

duly convened as a board or executive committee, and with the approval of the Secretary of Commerce. (46 U. S. C. A. 375.) Then and only then do the general rules partake of the force of law.

These alleged rules were promulgated by the local inspectors, without executive approval and without action by the Supervising Inspectors, either as a board or individually. Naturally the trial court held that the regulations of June 1940,—whether deemed in effect or not, were an absolute nullity. [A. I, p. 133.]

There can be no doubt that the OLYMPIC complied with every existing law or regulation pertaining to bulkheads and equipment in any class in which she conceivably might fall. No bulkheads whatsoever are required with respect to seagoing barges. One bulkhead is required for sailing vessels carrying passengers, which must be not less than 5 feet aft of the stem. (Rules of Supervising Inspectors, 1931, pp. 94-5; 129.) The OLYMPIC had such a bulkhead. The only requirements by statute or rule affecting seagoing barges are that they shall have approved equipment, consisting of one lifeboat, one anchor with suitable chain, and one life preserver for each person on board. (46 U. S. C. A. 396.) The OLYMPIC had all this equipment and much more. Her equipment fully complied with existing standards, for with it she had passed inspection time and time again.

So, subject to inspection or not, she actually complied with all statutory and rule requirements for a vessel of any possible class, and violated no statute or rule of safety possibly applicable to her.

As far as actual unseaworthiness is concerned, counsel's attempt to invoke *The Pennsylvania* rule is a confession

of inability to show from the evidence that unseaworthiness existed in fact, either as to manning or physical condition. The vague propaganda of unseaworthiness which permeates their presentation has no possible basis, except her age of 63 years. She had an iron hull and she was tight, staunch and strong. The talk about her "ancient plates" and "open and unprotected holds" is colorful, but does not mean anything. Her holds were not open or unprotected. She had a tight deck and tween-decks, and a tight hull; and she complied, as to bulkheads, with the present standards of Lloyds, American Bureau and the other great classification societies for any sailing vessel. Rule VI, Subd. 14, of the Supervising Inspectors (p. 179) provides that in the inspection of hulls, etc., the rules of the American Bureau of Shipping shall be accepted as standard by all inspectors, unless the rules otherwise provide. The rules of the American Bureau for 1940 (p. 31, Sec. 12) require for sailing vessels:—one collision bulkhead not less than 5 feet aft of the stem at the loadline.

The OLYMPIC was not even put on her defense by any proof that her lack of additional bulkheads made her unseaworthy in fact, and *her* proof shows that she complied, as to bulkheads, with the class rules for sailing vessels carrying passengers.

Counsel for the SAKITO seem to have the idea that the OLYMPIC owed some duty to the SAKITO to make herself sinking proof or damage proof. This is an astonishing concept of collision law and we have never encountered its like before. It seems to us the equivalent of a negligent automobile driver reproaching his victim because he was not riding in an armored truck. We confidently submit

that the OLYMPIC's only duty to SAKITO was to obey the applicable navigation laws, and if her condition permitted such compliance it does not matter an iota if her structure was seaworthy or unseaworthy. She might have been a water-logged wreck, but if she were properly anchored and gave proper signals, her condition could not have been a factor in the collision. Of course, the OLYMPIC's owners could not recover more than they lost, but they only recovered the *value* of the OLYMPIC as she was, and the amount of the recovery awarded is not challenged on this appeal.

The OLYMPIC, of course, owed her patrons and crew a duty to be seaworthy for the business in which she was engaged. She fully performed that duty, as the trial court found, and those of her patrons or their representatives who charged her with contributive unseaworthiness failed in their proof, and failed to obtain a recovery from the OLYMPIC's owners. They have all accepted the decision and have taken no appeals. Only the SAKITO, to whom no comparable duty was owed, complains of the decision.

It certainly does not lie with the SAKITO to invite the court to speculate as to whether the consequences of her great fault might have been less disastrous if the victim of that fault had been differently built or had been a larger or smaller or stronger vessel than she actually was. The SAKITO's faults were found to be the sole proximate cause of the collision [A. I, p. 137], which was the natural and obvious cause of all the consequences to the OLYMPIC and to those on board. No court would be justified in entering the realms of conjecture for the purpose of theorizing as to what might have resulted if

the OLYMPIC had been a different sort of ship than she was.

See:

The Walter A. Luckenbach (C. C. A. 9), 14 Fed. (2d) 100; 102-3.

For the sake of completing the presentation we shall examine briefly *The Pennsylvania* rule, or rather the burden of proof under it. If the OLYMPIC be held guilty of violation of any safety statute, either as to her manning or structure, it by no means follows that she has an unsustainable burden cast upon her. Severe as it is, *The Pennsylvania* burden is not a sort of "Tag! You are it!", but rests essentially upon principles of proximate cause. The burden is a practical one, and when there is a reasonable relation between the violation and the collision, a very heavy one. But where the statutory fault merely *exists* and has no operative effect in the collision picture, the burden, *ipso facto*, is sustained.

In *The Princess Sophia*, 61 Fed. (2d) 339; 347, this court said:

"The penalty is not that the violator is to be accountable for any mishap, regardless of its relation to the violation."

This proposition was applied by this court to the assumption that the *Princess Sophia* had violated binding American statutes, both as to the sufficiency of the crew and of the ship's equipment, and it was held that the failures, if they existed, did not have causal connection with the disaster (p. 348).

The above quotation was repeated in *The Denali*, 112 Fed. (2d) 952; 957, and a number of other cases were

therein cited where the non-relation of the violation was recognized, expressly or in necessary effect.

The North Star (C. C. A. 2), 255 Fed. 955;

Southern Pacific Co. v. United States (C. C. A. 2),
72 Fed. (2d) 212;

The Suduffco (D. C. N. Y.), 33 Fed. (2d) 775.

In *The Denali* (*supra*) the statutory violation was plainly a presently operative factor in the stranding, whereas in the other cases the alleged violations could only be related to the disaster or its consequences by more or less specious conjecture or speculation, in which the courts declined to indulge, and findings by the trial courts or commissioners that the violations were non-contributive were affirmed. Characteristic of the latter cases is *The Iowa*, 34 Fed. Supp. 843, wherein Judge Fee made a careful study of *The Denali* case (pp. 848-50) and reached the conclusion that *The Denali* did not preclude application of the non-relation principle of *The Princess Sophia*.

In *The Iowa* (*supra*) and in the other cases just cited, counsel for claimants at least attempted to work out a relation between violation and disaster, but in the case at bar that is evidently beyond counsel's ingenuity. They evidently leave it to the court to do the speculating for them.

We submit that if, conceivably, the OLYMPIC could be found guilty of any statutory or rule violation as to her manning, structure or equipment, it had no more relation to the collision than an extinguished green light would have in the case of a vessel approaching and colliding on the port side. There is nothing but SAKITO's faults in the whole collision picture.

III.

The Doctrine of Remote Negligence and the Major-Minor Fault Rule.

Although the trial court found that the OLYMPIC was free of all contributive fault, it alternatively applied the so-called "last clear chance" rule of the common law, and held that regardless of possible antecedent fault of the OLYMPIC, the SAKITO, by the exercise of reasonable care, could and should have avoided the collision. [A. I, pp. 137-8.] Counsel say (Br. p. 69) that the court "mutilated the fundamentals" of the last clear chance doctrine, and that it is rudimentary that the last clear chance doctrine only applies when the respondent is aware of the libelant's situation of danger.

There are two schools of thought on the doctrine of last clear chance, the minority rule being as counsel state. The fundamental rule of the common law, if we recall correctly, rested on the old case of *Davies v. Mann*, wherein the plaintiff's donkey had been let to graze on the highway and a coach driven by the defendant (who did not see the donkey) ran into it. This is the majority common law rule and the one which, either under the label of "last clear chance" or "remote negligence" is applied in the admiralty. The test of the latter rule is whether the vessel to be charged *knew or ought to have known* of the position or situation of the other. This is the rule which was applied in *The Cornelius Vanderbilt* (C. C. A. 2), 120 Fed. (2d) 766, cited by the trial court. [A. I, p. 137.] This is the rule which this court applied in *Crowley Launch and Tugboat Co. v. Wilmington Transportation Co.*, 117 Fed. (2d) 651 (much to the writer's chagrin and to the glee of counsel

now representing the SAKITO). In that case it will be remembered that the CROWLEY was held solely in fault for failing to *see* the other vessel in its assumed improper position. The doctrine of remote or non-contributive negligence has also been applied by this court to exonerate vessels guilty of positive violations of safety statutes, local and national, where the unlawful acts were long antecedent to the collisions.

The Europe, 190 Fed. 475;

The Yucatan, 226 Fed. 437;

American Hawaiian S. S. Co. v. King Cole Co.,
11 Fed. (2d) 41.

The first of the above cases involved improper lights, and the others unlawful positions.

While the trial court did not deem it necessary to consider the major-minor fault rule, it was elaborately briefed, and this seems to us to be a particularly cogent case for its application, should this court find anything to criticize in the OLYMPIC's conduct or condition.

There is probably no situation in which the major-minor fault rule has been so often applied as where a moving vessel runs down one drifting or at anchor, and attempts to pass or divide the blame with the anchored vessel by casting or attempting to cast doubt upon the propriety of the latter's position or conduct.

The Oregon, 158 U. S. 186;

The Newburg (C. C. A. 2); 124 Fed. 954;

The Mishawaka (D. Me.), 10 Fed. Supp. 722.

The Suedco (D. Conn.), 283 Fed. 796.

It should be remembered that *The Pennsylvania* rule, relating to statutory faults, did not abrogate the major-minor fault rule. Indeed the leading case on the latter rule, *The City of New York*, 147 U. S. 85, was decided long after *The Pennsylvania*, and excused a statutory fault of the involved sailing vessel which undoubtedly had some contributing effect in the collision.

We have not attempted to exhaust the material on the two points discussed in this subdivision or do more than suggest that these principles may be a factor herein. We do not feel they are really involved in the case. We can see no fault, remote, minor or otherwise, which can fairly be attributed to the OLYMPIC.

Conclusion.

It is confidently submitted that no reversible error appears in the record, and that the decrees in the principal cause and in such other, if any, of the causes consolidated with it as this court holds to be properly before it, should be in all respects affirmed.

Respectfully submitted,

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HUGH B. ROTCHFORD,
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Proctors for Appellees.

APPENDIX.

Extract from the OLYMPIC II's Reply Brief filed in the trial court upon submission of the Issues of Liability.

See foregoing brief on the merits, page 69.

Seaworthiness of the "OLYMPIC."

Until we received the court's request for all available data on the question of whether "OLYMPIC" was a seagoing barge within the meaning of Section 395 of Title 46 of the United States Code, we had not planned to discuss that question. It was and is our view that this case does not necessarily involve that question. Whether the "OLYMPIC" was subject to inspection or not, she actually complied, as to her structure and bulkheads, with all the requirements of statute and the rules of the supervising inspectors applicable to any class of vessels into which she could possibly fall;—unrigged vessel, seagoing barge, or even a sailing vessel carrying passengers for hire. However, as the court has requested counsel's assistance in respect to the seagoing barge question, we shall present the points we have been able to assemble in the first sub-head herein.

A. WAS THE "OLYMPIC" A SEAGOING BARGE?

As a background to a discussion of the seagoing barge statute, it may be well to briefly consider the history of federal marine inspection.

The present statutes providing for inspection of vessels are a sort of uncompleted crazy-quilt of legislation, going back almost to the beginning of steam navigation. Originally only steam vessels were considered as proper

subjects for inspection and regulation, and with very few exceptions this archaic situation continued until the last decade. In 1898 the requirements of inspection were extended to sailing vessels of over 700 tons, carrying passengers for hire. Even at the present time, sailing vessels which do not carry passengers are exempt from inspection. In 1908 inspection was extended to cover seagoing barges. It was not until 1936, or thereabouts, that motor vessels were brought under inspection requirements.

No comprehensive statutory plan of marine inspection has ever been worked out, but Congress has tinkered and patched at the statutory structure from time to time, with a result highly unsatisfactory from an administrative as well as a judicial standpoint. The very efficient department of marine inspection and navigation has always been greatly handicapped for lack of a consistent and comprehensive statute covering all classes of vessels which, as a matter of expediency, should be subject to inspection and skilled regulation. These difficulties have been augmented because Congress has frequently provided detailed, specific requirements as to structure and equipment for certain classes of vessels, and has left the requirements in other cases largely, if not entirely, to the rule making power of the board of supervising inspectors. Thus, in the Lifeboat Act for steamers (Section 481), Congress has provided plans and specifications for lifeboats and rafts down to the last row-lock; whereas, in the seagoing barge statute, there are no congressional requirements or standards as to structure or equipment, except that every barge shall have one lifeboat, one anchor with a suitable chain or cable, and at least one life preserver for every person on board.

The sections dealing with seagoing barges,—Sections 395-8, were enacted as parts of the Shipping Act of May 28, 1908 and are Sections 10 to 13 thereof. The substance of the present Section 395 was originally presented in the Senate as a separate bill and was passed quite early in the session with perfunctory debate. A sponsor of the bill made the following statement on the floor:

“Mr. Frye. I ask unanimous consent for the present consideration of the bill (S6487) to govern seagoing barges. There are 400 seagoing barges and they are the most dangerous of sea craft. Within two years 60 have gone to the bottom and 25% of the sailors have gone with them; the largest percentage of loss ever had on the ocean. They are absolutely without regulation. They are usually from 20 to 30 years of age. Many of them are old ships and barks which have been cut down after they were practically unserviceable, thus weakening their structural strength, and every once in a while one goes down in the ocean and takes with it its crew. Then again, it is easier for tugs to tow these barges with very long hawsers, making a range of barges three or four or five thousand feet long. Swayed hither and thither by the wind and tide and current, they constitute a worse danger to sailing ships and steamships than do derelicts. This bill simply provides that they shall be regulated, inspected and controlled as other seagoing vessels are . . .

Mr. Kean: Does this regulate the length of tows?

Mr. Frye: It does not. It simply allows the Secretary of Commerce and Labor to make rules and regulations in relation to it.”

Congressional Record 1908, p. 5333.

In the House, the Senate bill was incorporated with several other proposed enactments, some of which had already passed the Senate as independent bills. These dealt with the regulation of passenger steamers, mud scows in New York Harbor, and seagoing barges, and included the matter now embodied in Sections 395-8. There was considerable debate in the House on the bill as a whole, but that dealing with the seagoing barge aspect was practically a repetition of the statements made in the Senate. The following are pertinent passages from the debate:

“Mr. Cox of Indiana. This bill gives to inspectors powers to inspect seagoing barges of 100 tons and over and the right to inspect each with a view of seeing whether or not they are seaworthy and are safe to operate on the high seas. The evidence disclosed that by reason of the failure to have (federal inspection) the loss of property heretofore has been considerable, as well as the loss of life . . .

Mr. Sulzer: The bill is designed to regulate, so far as may be feasible at this time, the most dangerous form of navigation along our seaboard. There are between 400 and 500 seagoing barges of over 100 gross tons employed at present. During the past two fiscal years 60 of these barges were lost. Of the 60 vessels lost, 49 were built before 1898, and nearly half were over 30 years old. Many of these barges years ago were staunch ships and barks. As they have deteriorated they have been dismantled and large hatches have been cut in them, rendering them structurally even weaker. When for any cause these towed barges break loose from the towing steamer, those on board are practically helpless. Of 192 persons on board these 60 barges, 49 lost their lives, or over 25%, a death rate far in excess of the rate in

other classes of marine casualties here and abroad. A great demand in favor of this legislation comes from prominent people of New York, desirous to more carefully safeguard life on these seagoing barges."

Congressional Record 1908, pp. 6904-5.

The bill, as a whole, passed the House with little or no opposition, passed the Senate without a record vote, and was signed by the President.

It is quite evident from the debate that as far as conscious congressional intention was concerned, the subject of regulation was barges towed upon the high seas and engaged in carriage of property. The primary purpose was the safety of the lives of the crews, and a secondary one, the protection of navigation against the hazard of long tows. However, it is also apparent from the debate that the proponents of the bill did not contemplate that the regulation should be limited to conventional barges, but should include as well converted sailing vessel hulls which were towed on the high seas.

There is not much aid to be gained from the judicial interpretations of the statute, and so far as we can learn it has only been before the courts for general interpretation on two occasions. One was in our own circuit and one in the Supreme Court of Massachusetts. Both of these interpretations have involved questions of conflict of power as between state and federal authority over specific vessels.

The ninth Circuit case was *City of Los Angeles v. United Dredging Co.* (S. D. Cal.), 10 Fed. (2d) 239, affirmed (C. C. A. 9), 14 Fed. (2d) 364. The plaintiff

operated a dredge in Los Angeles Harbor under contract with the United States Government. It was equipped with engines and boilers for the purpose of operating the dredging shovels, and had living quarters for the man in charge and crew. It possessed no means of self-propulsion. The City of Los Angeles had an ordinance requiring a board of mechanical engineers to examine and license the operators of steam boilers and steam generating apparatus. The action was a suit to enjoin the city from causing the arrest of the plaintiff's employees, on the theory that exclusive power of regulation of a vessel of this type was vested in the federal authorities. Judge James granted the injunction, holding that the work of the steam dredge was maritime and that the structure was a seagoing barge within the meaning of Section 395. His judgment was affirmed on appeal. The Circuit Court of Appeals said that the evidence showed the vessels involved were great barges with dredging machinery put upon hulls having depth and staunchness to make it possible for them to be towed at sea; that they were decked over with hatches and carry crews of engineers and assistants during their operations, and were often towed long distances over the high seas. The principal concern of both courts was whether a dredge was such a vessel as to be a vessel or thing maritime within the admiralty jurisdiction, and the question of whether or not such a dredge was a seagoing barge received little attention. On this aspect of the case the appellate court said:

“Our opinion is that section 10 (*supra*) (now section 395) is applicable to the barges involved in this suit. The fact that it has not been the practice of inspectors to inspect the barges is immaterial to the decision.”

Evidently the case turned on the question of maritime subject matter. It is unlikely that the debates in Congress were brought to the attention of either court. It would seem to us that a very strong presentation could have been made to the effect that a vessel such as a harbor dredge, which performs practically all its functions within harbor waters, which is a flat-bottomed structure in the conventional form of a barge or scow, and which goes on the high seas only for the purpose of being transported from one scene of activity to another, was not a seagoing barge such as Congress intended to make subject to inspection laws. However, whether the point was seriously considered or not, the decision stands as a holding in this circuit that a harbor craft, which was built to be and was capable of being towed to sea, is a seagoing barge subject to inspection under Section 395.

In *Commonwealth v. Breakwater Co.*, 214 Mass. 10; 100 N. E. 1034, a prosecution was had under a local statute or ordinance relating to steam boilers. This particular boiler was part of the loading equipment of a rock barge, a large, flat-bottomed structure designed to carry cargo on deck and having accommodations for a crew. This barge in practice was towed back and forth on the high seas. The trial court, in effect, directed a verdict of guilty. The appellate court held that it was a question for the jury, under proper instructions, as to whether the particular barge was a seagoing barge within the intent of the act of Congress. If so, the verdict should be not guilty, for the barge was subject only to federal regulation. The court indicated its view that the test of a seagoing barge was one which might be expected with fair reason to ride out the ordinary perils of sea and which in fact does go

to sea. It suggested, however, that going to sea was not the true test of whether a barge was a seagoing barge within the congressional intent, as there might be vessels unsuitable for high seas work which in fact might go to sea successfully when conditions were favorable.

If this test is to be adopted, we would have very anomalous situation of a barge suitable for deep sea work being subject to inspection and one which was unsuitable being free to go to sea at will, freed of all inspection, regulation or control.

In 1938, in a series of acts amending the LaFollette Act of 1915, Congress excluded from the operation of the Act, as amended, seamen employed upon unrigged vessels "except seagoing barges," and included in the enactment the following definitions:

"When used in Sections 645a, 660b and 672b:—
(1) the term 'unrigged vessels' means any vessel that is not self-propelled; (2) the term 'seagoing barge' means any barge which, from its design and construction, may be reasonably expected to encounter and ride out the ordinary perils of the seas and which, in fact, in the usual course of its operations passes outside the line dividing inland waters from the high seas, as defined in Section 151 of Title 33, as amended."

46 U. S. C. A. 672c.

Evidently the draftsman of these definitions was using the case of *Commonwealth v. Breakwater Co.* (*supra*) as his source, but curiously enough the definition is only made applicable to the term "seagoing barge" as used in the amendments to the LaFollette Act, and is not intended to apply to Section 395, which makes seagoing barges subject

to inspection. The LaFollette Act was purely a seamen's act, regulating the employment, duties and discharge of American merchant seamen.

When we apply this background of statute and judicial construction to the particular case of the OLYMPIC, it is fully apparent that there are some factors which suggest that she may come within the category of a seagoing barge, as intended by Section 395, and there are others which pointedly indicate that she does not.

Clearly it was not the Congressional intent to limit "seagoing barges" to vessels which were structurally flat-bottomed and square ended, and that there was intended to be included therein converted or cut down sailing ships or steamer hulls which did not proceed under their own power, but were towed at sea. It is equally clear that Congress did not intend to include in the category of seagoing barges all vessels, merely because they happen to be towed. Certainly it was not the intent that a full-rigged and manned sailing ship would be a sailing ship and subject to the laws governing sailing ships while proceeding under her own power, and become a seagoing barge because she happened to be towed by a tug on one or more voyages or parts of a voyage. It must be that some actual metamorphosis of structure has to take place before a vessel passes from one category to another. Just what that is seems to be entirely a matter of first impression.

Before dealing specifically with the case of the "OLYMPIC" it may not be amiss to go off the record and consider the history of another local vessel,—the "STAR OF SCOTLAND". She was an iron or steel sailing vessel, 50 feet longer than the "OLYMPIC". Like the "OLYMPIC" she had been one of the Alaska Packers fleet, and when that company gave up sail in favor of steam, she was sold to

operators of pleasure fishing craft. For some years she was anchored off Santa Monica and used just as the "OLYMPIC" was used,—for the reception of fishermen who were brought out to her in shore boats. Whether she actually had sails on board we do not know, but all her top hamper and standing rigging were in place. She had her masts, top masts, top gallant masts, and possibly royal masts in place, with the usual yards, shrouds, stays and other standing rigging. To the eye and, we believe in fact, she was a conventional sailing vessel and needed only to bend on sails and move away under her own power. This invites the query,—Did she remain a sailing ship or had she become a seagoing barge merely because her then occupation was to lie at anchor and furnish a platform for fishermen?

A few years ago she was sold by her owners and emerged from the shipyards as the gambling ship "Rex". All her top hamper was taken down, including her lower masts. Her main deck was housed over with a large shed, and her main decks and tweendecks fitted up for gambling rooms, a restaurant, a bar, etc. To the eye, she ceased to look like a ship and indeed looked more like Noah's Ark than anything else. It was only on close approach and an observation of the clean hull lines that her former character could be comprehended.

After her brief and notorious function as a gambling ship she lay in the mud for some months, but is now being restored to her former state as a full-rigged sailing vessel, and will shortly be on the high seas again as such. The query which suggests itself is,—When, if ever, did the "STAR OF SCOTLAND" cease to be a ship and become a barge? Curiously enough, during her service as a fishing vessel and when she had all her top hamper she was called,

in the general language of the port, a "fishing barge". When her top hamper was dismantled and she was converted to an ark, she become in common parlance a "gambling ship". Now she is to become a sailing vessel again.

We have no doubt that the "STAR OF SCOTLAND" ceased to be a sailing ship when her top hamper was dismantled and the superstructure was built on her decks. Did she become a barge or a seagoing barge? It is true that by reason of the essential structure of her hull she was capable of being towed at sea and was towed out to the scene of her activities and back again. It is, however, a very difficult stretch of the imagination to call her a barge, either by definition or as a matter of common parlance. About the only category in which she could fit as a gambling ship would be a "nondescript, non-self-propelled vessel", which inspired description will be found in one of the recent acts of Congress amending the limitation of liability law. (Title 46, Section 183b.)

On the other hand, we do not think she ceased to be a sailing ship while she retained all her top hamper, merely because she was used as a fishing platform. During all that time she was still essentially a ship,—not a barge or an unrigged vessel of any character. She was just as much of a ship as any sailing vessel which, on a voyage, might enter into a contract for towage for the purpose of expediting her passage.

Structurally the "OLYMPIC" was and always remained a ship. After her service with Alaska Packers the only essential change which was made in her was to take down her top hamper and store it in the tweendecks. Her lower masts were left at the caps. Her yards, spars and standing rigging were taken down and stored below decks. She could not, by merely bending on sails, depart from her

place of anchorage under her own power (except, of course, with a makeshift rig on her lower masts), but with a few days work by riggers, all her top hamper could have been replaced and she would have been just as much a sailing ship as she ever was.

Considerable thought on this question has led us to wonder if a good deal of confusion of thought on this problem is not due to the accident of local nomenclature. "Fishing barges" seem to be confined to this particular locality;—at least we have never heard of similar enterprises elsewhere. In the early days they were in fact barges—conventional flat-bottomed, square-ended boxes, such as those which haul rock back and forth from the Catalina quarries. To these box-like hulls were superadded flimsy deck structures to contain a little restaurant and other conveniences for the patrons.

Patrons got used to going to these vessels and calling them "fishing barges". Then ship hulls, wooden, iron and steel, began to be used. The economic impossibility of using sailing vessels made these hulls relatively cheap to acquire, and many of the operators adopted them as eminently more suitable than the flat-bottomed, square-ended hulls. However, the old name stuck and any vessel engaged in that occupation was a "fishing barge", whether she was a square box or a sailing vessel with all her rigging in place, like the "STAR OF SCOTLAND".

We submit, as a not unreasonable statement, that vessels such as the "OLYMPIC" and the "STAR OF SCOTLAND", and no doubt a number of others, really should be called "fishing ships". Certainly they did not become barges *per se* merely because of a change of occupation.

Owing to the radical changes in their structure, the gambling vessels were rendered more or less permanently

unsuitable as ships, yet, through the accident of nomenclature, no one ever called them anything but gambling ships.

The dictionary definitions of the term "barge" are not particularly helpful. In Webster's New International Dictionary we find the following:

"barge; of uncertain origin. 1. A pleasure boat; a vessel or boat of state, elegantly furnished and decorated. 2. Any of various boats or vessels; as: (a) A roomy boat, usually flat-bottomed, and used principally in harbors and on rivers and canals, for the conveyance of passengers or goods; as, a coal barge. It may have sails or means of self-propulsion, but is more often towed. (b) *Nav.* A large, double-banked boat supplied only to a flagship for the use of the flag officer. (c) A double-decked vessel towed by a tug or steamboat;—used esp. for large pleasure parties. *U. S.* (d) A sailing vessel; a bark. *Obs.*"

In Bradford's Glossary of Sea Terms, the definition is:

"Barge—a general name given to a large pulling boat. (Evidently the Admiral's barge of the navy or the 'barges' of royalty.) It is often given to flat-bottomed craft, but more particularly to vessels built for towage purposes."

We have not found any dictionary definition which includes within the term "barge", a cut-down or converted ship's hull, but there can be no doubt that on the east coast at least, sailing vessels and steamer hulls which are transported by being towed are called "barges", and in some cases "seagoing barges".

The practice of transporting cargo in cut-down or converted ships' hulls is quite prevalent on the east coast,

where the hauls between ports are short. These vessels generally carry small crews,—a barge master and two or three men to act as helmsmen, for these barges aid navigation to the extent of steering themselves at the end of the tow line. We had one or two on this coast during the last war, but as far as we know there have been none for many years. We do have a type of flat-bottomed barge in this area which fully meets the concept of seagoing barges, as indicated in the case of *Commonwealth v. Breakwater Co. (supra)*. These are the flat-bottomed barges operated by Wilmington Transportation Company, Rohl-Connolly Company, *et al*, and which are used in carrying rock from the Catalina quarries to the mainland. Some of these are very large vessels—over 100 feet long, but they do not steer, carry no crews, and have no accommodations for crews. These vessels, although seagoing, both as to structure and actual operation, are not inspected and do not carry lifeboats as required of seagoing barges by Section 396. To do so would be futile, for no persons are aboard them.

We submit that the question, whether any particular vessel is or is not a seagoing barge, is essentially a question of fact and not of law, and that as guide-posts for the determination of the fact a court might well apply the following considerations and questions:

While the matter of general or local nonmenclature should not be entirely disregarded, it should not be slavishly followed. A vessel is not a barge merely because it happens to be called a barge. The obvious intent of Congress was to make subject to inspection, unrigged vessels which transported goods or property on the high seas. Square-ended, flat-bottomed vessels, without sails or power, are barges by generic definition, and if designed

and intended to be used on the high seas, are seagoing barges *per se*. When the vessel under consideration was built and remains with the conventional lines and structure of a ship, she may fall into the category of a seagoing barge if she is actually dismantled so as to lose entirely her former character and is used or intended to be used in transportation on the high seas, with her motive power supplied by towing. The fact that a sailing vessel or steamer has her engines or rigging dismantled, in whole or in part, does not of itself destroy her character as a ship and make her a barge. The court must go further and ask if, on all the facts, her actual or intended use was such as to bring her reasonably within the Congressional intention, as disclosed by the language of the Act regulating seagoing barges, and explained by the debates in Congress.

Essentially the question is,—Has the vessel, in the light of all the circumstances, lost her character as a ship and become a barge? Before that question can be answered in the affirmative, the court must be satisfied that some essential change has taken place, for a ship will still remain a ship, rigged or dismantled, at sea or at anchor, as long as no change in her essential character has occurred.

In the limitation proceeding filed on behalf of "OLYMPIC", our friends who represented "SAKITO" claimed vigorously that "OLYMPIC" was not a barge, but a ship. We contended that she was a barge by ordinary nomenclature. It is perhaps fortunate for both sides that the duties of advocacy do not always require one to be consistent.

We may as well cover under this sub-head the question of whether the "OLYMPIC", if not a seagoing barge, was subject to inspection under any other statute.

The only statute which has been suggested as an alternative possibility is the second sentence of Section 391, which provides:

"The local inspectors shall, once in every year at least, carefully inspect the hull of each sail vessel of over 700 tons carrying passengers for hire and all other vessels and barges of over 100 tons burden carrying passengers for hire within their respective districts, and shall satisfy themselves that every such vessel so submitted to their inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in the condition to warrant the belief that she may be used in navigation with safety to life."

Although she was structurally a sailing ship, it is hardly reasonable to say that the "OLYMPIC" was a "sail vessel" at the time of this accident, as she did not propel herself by sail. But, whether she be regarded as a sail vessel or falling into the class of "other vessels and barges of over 100 tons burden", she was definitely not engaged in *carrying* passengers for hire.

This is no quibbling technicality. The "OLYMPIC" did not "carry passengers". She furnished to her patrons a service, but it was not the service of carriage. She afforded them a floating platform, which did not move, upon which they were furnished certain facilities and comforts, and upon which they were permitted to fish.

The verb "carry" and its various parts, used transitively, has a definite connotation of transportation from place to place. It is defined in the standard dictionary as

“To bear or cause to be borne, as from one place to another”. The definition in Webster’s New International Dictionary is: “To convey or transport while supporting, originally in a cart or car, hence in any manner; to bear, to transfer, to take.”

There can be no serious doubt that wherever the term “carrying passengers for hire” is used throughout the inspection statute, it refers to the conventional act of transporting passengers from place to place.

In *Chicago, R. I. & P. Ry. Co. v. Petroleum Refining Co.*, 39 Fed. (2d) 629-30, the question before the court was whether the movement of an empty tank car belonging to a shipper was a shipment or carriage. It quoted the standard dictionary definition of “carry” and said:

“In the case of *United States v. Sheldon*, 2 Wheat. 119, 120, 4 L. Ed. 199, it was said: ‘There is no doubt but that the word transport, correctly interpreted . . . means to carry, to convey.’ *Ogdensburg, etc. R. R. Co. v. Pratt*, 22 Wall. 123, 133, 22 L. Ed. 827, said: ‘Transported or carried are equivalent terms.’

“The movement in the other way is expressed by the words ‘pull’, or ‘draw’, or ‘push’, or ‘shove’.”

A vessel or structure which does not move goods or passengers from place to place, but merely furnishes them with a platform or warehouse, upon or within which to rest, is not a carrier. This has been clearly established in the maritime law in cases with respect to goods. It is a common practice on the Great Lakes, where vessels are laid up during the winter, to use them as a combination carrier and warehouse for grain products. In some cases bills of lading have been issued calling for the transporta-

tion of wheat from one port to another, storage through the winter at the place of destination, and delivery in the spring. The courts have held consistently that those contracts have a definitely dual aspect. They are: (1) a contract for carriage; that is, transportation from the port of shipment to the port of destination; and (2) a contract for warehousing. These two involve absolutely different standards of liability and, indeed, that aspect of the contract which covers the furnishing of storage for the cargo is so essentially different from transportation that it is not cognizable in a court of admiralty. The cases are collected and discussed in *Pillsbury Flour Mills Co. v. Interlake S. S. Co.* (C. C. A. 2), 40 Fed. (2d) 439, where, under such a contract for shipment and storage, the vessel arrived with the cargo apparently in good condition, but during the winter something occurred to damage it. A suit in admiralty for cargo damage was dismissed for lack of jurisdiction, and the appellate court, in affirming the judgment, said, after reviewing the authorities:

“These bills of lading embody a dual contract, one for transportation and the other for storage, and a breach of that contractual obligation which is non-maritime may not be the subject of a suit in admiralty. (Citing cases.) When the cargo arrived at Buffalo and came to anchor in the outer harbor, under the agreements contained in the bills of lading, the maritime service of carriage ended and the appellee then became a warehouseman for the grain. (Citing cases.) . . . The vessel encountered some heavy weather on her trip down but the grain, upon examination of insurance underwriters, was found not to have been damaged on arrival at the anchorage inside the breakwater. It was found, when the cargo

was delivered April 7, 1928, that serious damage had been done to the grain. The libel pleads a breach of contract, not a negligent act. There was a constructive delivery and a termination of the maritime liability of the vessel on her arrival at her anchorage. At that time, the initial liability of the carrier changed to that of warehouseman." (pp. 440-1).

The contract or contracts which Hermosa made with its passengers or patrons also partake of a dual character. They embodied transportation by shore boats from shore out to the barge, and from the barge back to shore. That aspect of the engagement was truly a contract of carriage, and the shore boats were "carrying passengers for hire." The service on the barge was not the service of carriage or transportation or conveying. It was essentially the hiring and letting of space on a motionless platform;—about as close an analogy as we could get to the letting of the cargo space on a vessel for warehousing.

We should not be understood as saying that the hiring of such space to passengers for the purpose of fishing is not a maritime contract. We think it is. In that respect it differs from warehousing goods. Fishing is a maritime function, and the use of a vessel for fishing is a maritime service and a maritime transaction, but it is not the service of carriage, and vessels which afford such service cannot have their obligations measured by those standards applicable only to vessels *carrying* passengers for hire. The standards of seaworthiness as between a vessel and those who utilize her service are that the vessel shall be seaworthy for the purposes contemplated by the contract or transaction. If one contracts for *car-*

riage on a vessel as a passenger, he is entitled to have her comply with the standards of passenger *carrying* vessels. If he contracts for the use of a vessel as a platform, he is not entitled to expect the vessel to comply with the standards of a carrier. The same distinction applies as between one who offers goods to a vessel for *carriage* and one who offers them for *storage*.

In presenting the considerations under this sub-head, neither the writers nor Hermosa are to be understood as advocating that fishing barges or vessels rendering this sort of service should not be subject to inspection. We think they should and so does Hermosa. In its operations of the "OLYMPIC", Hermosa has always made every effort to have the vessel inspected. It has never looked for loop-holes in the law or sought to escape inspection by technicalities or otherwise. When the vessel was first about to commence operations in 1934, Captain Andersen applied for inspection, but was informed by the local inspectors that the office had no jurisdiction. In 1936 the local board suddenly reversed its attitude and assessed penalties against all the barges for not having certificates. Hermosa at once submitted the "OLYMPIC" for inspection, complied with all requirements provided by law and the general rules of the supervising inspectors, and received for 1937 and 1938 certificates of inspection. The return of the latter certificate was demanded in April 1938, within two or three weeks of its issuance, on the theory, apparently, that no outstanding certificates were valid unless the vessel complied with the

requirements of the coastline load line law. That attitude was shortly reversed, but when Captain Andersen sought the return of the certificate or a new inspection, he was informed that fishing barges would not be inspected pending some new requirements which were then in the course of formulation. Apparently about this time the local board was seeking information as to the structure of various of the so-called "pleasure barges", for it asked and received from Captain Andersen a blue print of the "OLYMPIC", which he furnished voluntarily and at no little expense. The history of Hermosa's relations with the Bureau of Navigation has been one of the fullest cooperation, and discloses the constant intent and desire to submit the vessel to inspection, whether she was required by law to be inspected or not. It would be a strange irony of fate if Hermosa should fortuitously suffer a penalty on account of the technicality of no certificate of inspection, in the face of its constant endeavor to comply with the law, regardless of technicality.

Whether these fishing barges or vessels are or are not seagoing barges, or are or are not within the statute requiring inspection of vessels carrying passengers for hire, we have little doubt that they should be subject to inspection and regulation, as all vessels should be upon which human lives are exposed to the perils of the sea. We are not even prepared to say that general rules comparable to the various "orders" or "minimum requirements" purportedly promulgated by the local board in June 1940 would not be desirable, not only with respect

to the so-called pleasure barges, but to all craft on the high seas or in harbors upon which human lives are exposed to the inevitable perils of maritime activity. But, subject to inspection or not, the "OLYMPIC" on September 4, 1940 complied with all existing standards of seaworthiness, and liability may not be imposed upon her because from a social standpoint it might be desirable that these standards be made more rigid.

At the court's request we have covered, to the best of our ability, the question as to whether or not "OLYMPIC" was subject to inspection as a seagoing barge or otherwise. We respectfully insist, however, that a solution of that problem is unnecessary to a decision in this case. Our reasoning has been fully set forth in our opening brief and will be augmented in the next sub-head, where we will take up what remains of the contentions advanced in the opening brief of the "SAKITO".

No. 10,190

United States
Circuit Court of Appeals
For the Ninth Circuit *4*

STERLING CARR, as Trustee in Bankruptcy of
NIPPON YUSEN KABUSHIKI KAISYA, a
Corporation, Bankrupt, and FIDELITY AND
DEPOSIT COMPANY of MARYLAND, a Cor-
poration,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD.,
a Corporation, and J. M. ANDERSEN,

Appellees.

(And Fourteen Consolidated Appeals.)

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

I.

PRELIMINARY.

We address this answer to "appellees' reply brief on the merits", pages 11-77, inclusive, disregarding for the present the motion coupled therewith for a dismissal of certain of the appeals consolidated herein.

In preparing our reply it has seemed to us best to follow along the order of appellees' presentation except for seven preliminary points or observations separately listed below.

1. Burden of Proof.

We are not a little astounded by the position taken by appellees that we must sustain the burden of establishing the insufficiency of the lookout on board the Olympic II and the sufficiency of the lookout on the Sakito Maru. This, however, appears to be their theory, for they say:

"Counsel make little or no attempt to defend the Sakito's incompetent lookout, saying merely that the finding must fall if visibility is determined to be approximately 200 meters. * * *

"'Every doubt as to the performance of the duty (lookout) and the effect of non-performance should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.'

The Ariadne, 13 Wall. 475; 20 L. Ed. 542.

"The Sakito, we submit, did not even begin to sustain the burden." (Appellees' Brief, page 41)

And on page 62 of their brief, referring to their own lookout, they say:

"The burden of proof was and is on the Sakito to show that Ohiser (Olympic lookout) was not a competent lookout and did not exercise the diligence the situation required. She must show, therefore, that he lacked attentive watchfulness.

The Catalina, (C.C.A. 9) 95 Fed. (2d), 283, 285."

We submit that these statements of the "law" set forth in the same brief are irreconcilable and evidence only the action of a mind eager to sustain a judgment at all events.

2. Beaufort Scale.

The force of the wind has a direct bearing on the dead-reckoning position which appellees' counsel fix for the Sakito Maru at 7:00 A.M. That force was force 1, Beaufort Scale, or a velocity of 7 knots. Counsel state:

"The Olympic was anchored on a calm sea, with a wind hardly capable of filling a small boat's sail. (We wonder where counsel got the Beaufort Scale which shows force 1 as approximately 7 knots per hour. (Br. p. 5).)" (Appellees' Brief, page 59)

We got this scale rating from page 13 of the same source from which appellees secured their definition of "barge" (Appellees' Brief, App. p. 13), to wit, from Captain Bradford's "Glossary of Sea Terms".

And on page 37 of their brief, appellees' counsel state:

"It is said that the Sakito was proceeding into a head wind, force 1, and the tide was affecting her. Force 1, according to the Beaufort Scale, is from 1 to 3 miles per hour, and is not sufficient to move a wind vane. * * * (Knight, Modern Seamanship, 10th Ed., p. 673.)"

As we understand the table in Knight's work, such table does not express the velocity of the wind. It deals with the velocity of vessels. A force 1 wind is such a wind as will move a fishing smack at about 2 knots per hour. The velocity of the wind is an altogether different thing, and the Beaufort Scale itself undertakes no correlation of wind forces to anything other than to the movement of vessels. In the absence of anything establishing its inaccuracy, we are accepting Captain Bradford's approximation as substantially accurate correlations of wind velocity to the movement of sailing vessels, which is shown by Beaufort's Scale.

We repeat that this variable which was *against* the Sakito making good her full run between 5:58 and 7:03 A.M. and the

factor of tide which was also *against* her making her full dead-reckoning run, are prime factors which upset all of appellees' nice calculations. These factors both operating against her certainly could not as well have had possibly an accelerating effect, as counsel intimate. We have never seen a case where "nice calculations" were so urgently pressed to fix a vessel's position in which the time and variables were so great. See

The Cape Franklin (1929) 39 F. (2d) 971, 972 (E.D. N.Y.);

The John Craig (1895) 66 F. 596, 598 (D.C. N.Y.);

The Newport (1888) 36 F. 910 C.C. N.Y.).

3. The evidence—witnesses.

In determining whether the rule of

The Ernest H. Meyer (1937) 84 F. (2d) 496 (C.C.A. 9) should apply to its review of the trial court's findings, we respectfully request this Court to refer again to the eleven lines of our opening brief (pages 9 and 10) stating what witnesses testified in Court, what witnesses testified by deposition, and what witnesses by "statement". When counsel for appellees assert:

"A few minor witnesses from the Sakito's deck watch were unavailable at the trial, * * *" (Br. p. 17)

such statement cannot be challenged except as a half-truth. Only Captain Sato of the Sakito Maru was present and testified at the trial. All minor and major witnesses from the engine room watch and deck watch except Captain Sato were unavailable at the trial.

4. What Olympic's witness Stiles saw.

Referring to when Olympic's witness Stiles saw the Sakito Maru at a time when she was only 100 to 150 yards away, counsel state the Sakito "had evidently made her turn, as he

could only see the bow, not the whole side". That is not the testimony in this record, and we quote:

"Mr. Cluff: (Referring to when Stiles saw the Sakito) You could see the whole of the starboard side? A. Yes."
(Ap. II, p. 717)

In other words, the Sakito Maru, according to this statement of this witness, must have turned in about half her own length to come stem on at a near right angle into the side of the Olympic II.

5. Ohiser's and Johnson's testimony irreconcilable—Jones' testimony.

Effort is made throughout appellees' brief to bulwark Ohiser's testimony by an asserted showing that it is the same as Johnson's. Counsel state that apparently Ohiser and Johnson saw the Sakito at about the same time. (Br. pp. 22, 61) That is not the record before this Court. Johnson happened to look up and see the Sakito, and responding to an inquiry of appellees' proctor as to whether he could give "an idea of how far away it seemed", stated:

"A. Yes. Since I spoke *and thought of it a lot*, I am sure it was over a half a mile, probably three-quarters of a mile away." (Ap. II, p. 554)

As we pointed out in our opening brief (p. 12) with appropriate record references (Ap. II, p. 687), Ohiser said he saw the Sakito Maru ten to twenty minutes before the collision. Let us correlate these estimates of time and distance to the Sakito's speed.

First we shall take Ohiser's minimum estimate of time, ten minutes, and Johnson's maximum estimate of distance, three-quarters of a mile. This will bring them as close together as the record permits. We shall also take the Sakito's own record as to her speed as that will further assist in "establishing" our

adversaries' point that Ohiser and Johnson saw the vessel "at about the same time." The figures are as follows:

<u>Time Intervals</u>	<u>Sakito Speed</u>	<u>Elapsed Time</u>	<u>Distance*</u>
7:00½-7:03	16K.	2½ min.	4,000 feet
7:03 -7:06	11K. (Av.)	3 min.	3,300 feet
7:06 -7:09	6K.	3 min.	1,800 feet
7:09 -7:10½	3K. (Av.)	1½ min.	450 feet
		10 min.	9,550 feet

*Figured on a rough basis of 1 knot 6000 feet to aid Ohiser.

On this record Ohiser saw the Sakito about two miles away and Johnson $\frac{3}{4}$ of a mile away. Apparently they did not see her at about the same time.

But let us give the Sakito the best of it and assume the maximum time for Ohiser and the minimum distance for Johnson; i. e., 20 minutes and $\frac{1}{2}$ mile. This will add 16,000 feet to the distance away at which Ohiser saw the Sakito headed west on a parallel course, or a total distance of 25,550 feet—nearly five miles for Ohiser, as against one-half mile for Johnson. Should we go further and assume the speed which Olympic's sailor-witness Grothe's testimony attributed to the Sakito just prior to the collision (Ap. I, p. 473), Ohiser saw the Sakito nearly eight miles away, which is very good "seeing" for such a dull and foggy morning and is about 16 times as far away as Johnson saw her.

The testimony that Jones thinks he would have seen the Sakito earlier if he had looked (Br. p. 24) stressed by appellees is hardly consistent with his testimony that he heard the Sakito's whistle just before she "loomed up out of the fog". (Ap. II, p. 482)

Witnesses not mentioned above were dealt with in detail in our opening brief, and we repeat there is no credible evidence in the record which justifies a finding that visibility was at least 1800 feet. The assumed disinterested character of most

of appellees' witnesses does not improve the quality of their testimony as proof of any fact when it is demonstrably a hodge-podge of impossibilities. We may assume that appellees called their best witnesses, and, had they called any more, their record would be even more erratic.

6. Collins' testimony—the distances between Olympic—Point Loma and Rainbow.

The statement is made that we endeavor to discredit our witness Collins. (Br. p. 26) We do no such thing. We simply point out that in the light of the best evidence of the distances between the vessels Olympic and Point Loma on the morning of the collision, his estimates are subject to a 50% error. We do not think Reeder's location of the three barges fixed by observations taken aboard his vessel while alongside each of them in April and May, 1940, four months before this collision, can be accepted as proving that the positions of the barges were the same on the day of the collision. (Br. p. 13) In asserting this we do not take the technical position that such determinations were remote in point of time. Our points are:

(a) The barges were continually having trouble with their anchors and this is clearly indicative of changes in position. (Ap. III, p. 1070)

(b) Lieutenant Hewins of the Coast Guard was continually patrolling these waters at a time close to the collision. He fixed their positions from recollection and from observations taken over the wreck of the Olympic. (Ap. III, pp. 985-987) Captain Andersen, Hermosa's president and in charge of the Olympic's operations, also gave testimony on this point and his estimates of distance with respect to the Rainbow are much closer to Hewins' than to Reeder's. He placed the Rainbow 880 yards off the Olympic's starboard quarter (Hewins 586 yards) (Reeder 1800 yards). Captain Andersen places the

Point Loma a little farther away than Reeder did and more than twice as far as Hewins but he was not there the morning of the collision. (Ap. I, pp. 356-357)

(c) No witness confirms Collins' testimony that the Sakito Maru gave the Olympic a broadside push of 200 *yards*. The entire record discloses a push of not exceeding 200 *feet*.

7. The Olympic's bell—audibility.

Counsel spend considerable space advising the Court of the audibility of the Olympic's bell. We did not attack its audibility. We asserted:

- (a) Proof that it was regularly sounded at the critical periods is very weak;
- (b) It was not the proper signal under Article 9(i), (33 U.S.C.A. Sec. 79(i));
- (c) Good seamanship in the situation of the Olympic required greater precautions than a usual anchor bell.

When counsel inform the Court that on the morning of the collision Olympic's bell "was heard by almost everyone within a radius of a mile, except the officers and lookout of the Sakito" (Br. p. 28), they misstate the record. No one even as far away as $\frac{1}{2}$ a mile testified to hearing the bell. The statement that it was heard on the Rainbow finds no support in the evidence. It is a gratuitous assumption.

II.

GENERAL REPLY.

Ohiser on ringing the bell.

Appellees state we confused Ohiser on cross-examination (Br. p. 30). The portion of Ohiser's testimony which we quoted on page 44 of our brief was given in response to questions

of the court. He said he thought he stopped ringing the bell at regular intervals after he sighted the Sakito. We make no assumptions in this regard. It is the man's testimony in this case. (Ap. II, p. 688) It is one of the facts proved by the Olympic's own evidence and in view of the general and vague testimony of other witnesses on the point, it is a critical fact. Reading Ohiser's entire testimony, he appears to us a literate, competent witness and one who spoke with assurance. He was unstable on visibility, probably because in his inexperience he never thought of it as anything important, and uncertain about sounding the bell because he was trying to be truthful. Certainly it hurt appellees that Ohiser remembered Greenwood came over toward the end to help him ring the bell. (Ap. II, p. 704) But we see no reason why his testimony on these two points should have been disregarded by the trial court or should be disregarded here simply because we cannot corroborate it. (Appellees' Brief, p. 31)

The Presumption of Fault against the Sakito.

(Appellees' Brief, pp. 19, 20 and 31)

In opening their argument, counsel for appellees rely upon the presumption of fault arising where a moving vessel runs into a stationary object. Their own quotation from

United States v. King Coal Co. (1925) 5 F. (2d) 780, 783 (C.C.A. 9)

shows that this presumption is not a universal one, but is one to be applied in circumstances which do not exist in this case. A preliminary burden of proper anchorage or mooring, proper signals, proper lookout and observance of such other precautions for safety as the dictates of prudent seamanship requires, is a condition of any presumption. Absent such proof, there can be no presumption, for it is a dependent and not an independent one.

The Sakito Maru's Speed.

(Appellees' Brief, pp. 31-38)

Counsels' suggestion that a navigator must at all times know his exact visibility appears to us to be absurd. (Br. pp. 33, 34) Such perfection could only be achieved in any case by stopping the ship and sending out a small boat to the point where she just disappeared. Then by the time the vessel got under way again, conditions might have changed. Likewise, the small boat might be less or more visible than the vessels the ship's navigator might meet, upsetting all calculations. If such procedure had to be followed every time visibility was under two miles, there would be little commerce by sea.

We do not question the soundness of the decision of Mr. Justice Holmes in *The Germanic* (1905), 196 U.S. 589, 25 S. Ct. 317, which is simply and directly to the point that an expert can be found negligent. Every verdict in a malpractice case proves that. What we do contend is that the existence of such negligence is in any case a question of fact and not one which is proved by the establishment of an error.

Same—Captain Arthur's Testimony.

(Appellees' Brief, p. 34)

The brief in support of appellees refers to Captain Arthur's testimony "(A. III, pp. 1234-5)". The page reference is incorrect, but the portion quoted is from Ap. III, pp. 1324-5. The real vice in quoting that testimony is that it fails to quote the hypothetical question which preceded it. Such question assumed nothing concerning the character, reversing power, burden or maneuverability of the particular vessel involved in this case—to wit, the Sakito Maru. If further assumes what Captain Sato and Chief Officer Yokota did not know—the precise range of visibility. The testimony is for such reasons valueless for any purpose in this case.

Same—The Sakito's Navigation Chart Record.

Counsel say that the trial court refused to take the evidence of various witnesses who estimated the Sakito's speed at 9-12 miles per hour (giving us no record references) "but preferred to take the evidence of the Sakito's own navigation and engine room records, which indicated that at 7:09 the Sakito was moving at approximately 12 miles per hour".

In our opening brief, p. 63, n. 13, we demonstrated how impossible it would be to fix with any degree of accuracy the position of the Sakito Maru at 7:00, 7:03, 7:06, or 7:09 upon the basis of a 5:58 A. M. fix without precise information as to the wind and tide and their effects upon the particular vessel. We know that both retarded the Sakito and counsel and the trial court undertake arbitrarily to speculate upon the exact extent of such retardation. That is counsel's case for a speed exceeding 6 to $6\frac{1}{2}$ knots at 7:09. It is rank speculation.

Same—The Record of Sakito's Revolution Counters.

(Appellees' Brief, pp. 36-37)

Appellees' counsel are correct in stating that we do not dispute that the revolution counters of the Sakito Maru between 7:03 and 7:09 show she turned a total of 501 revolutions. That is an average of 83.5 per minute. What we do dispute is that the conclusion can be drawn therefrom that the Sakito Maru's propellers were turning 83.5 revolutions per minute at the end of this period instead of 50 as testified to by her officers. The figure 83.5 represents an average between the full ahead revolutions of 118 at 7:03 and the slow ahead revolutions of 50 at 7:09.

During the first part of the period between 7:03 and 7:09, the Sakito Maru was decelerating from 118 revolutions and during such time her inertia was driving her through the water

at a rate faster than her engines were turning. The effect of passage through the water at such speeds (until full deceleration was accomplished) was to drive the propellers or cause them to revolve in a ratio proportioned to her speed through the water. No actual propelling force would be achieved until the way of the vessel through the water synchronized with the revolutions of her engines. These figures *disprove* and do not tend to *prove* a greater speed than 6-6½ knots at 7:09.

Sakito's Lookout.

Counsel complain that the trial court failed to find that the Sakito did not have a lookout at all, saying:

"Half a dozen witnesses had a clear view of the Sakito's bows as she approached the Olympic, *of which several were experienced seamen* who knew where a lookout should be posted and were consciously looking for him." (Br. p. 39)*

The half dozen witnesses referred to include *only one man* who testified that he had had any experience on sea-going vessels. That was Grothe, who had eight years before been an A.B. seaman for about two years. (Ap. III, p. 414)

The Sakito's change of course.

Counsel state at page 40 that the time when the Sakito saw the Olympic is fixed "by the start of her admitted swing to starboard". No substantial swing to starboard between the time of sighting the Olympic and the collision has ever been admitted. A change of helm is admitted 1½ minutes prior to the collision, but the evidence is undisputed that the Sakito would, through inertia, follow her old course approximately 200 meters before answering her helm. Her heading might change quickly, but her course would not.

*Emphasis ours throughout unless otherwise noted.

The Angle of Collision.

(Appellees' Brief, pp. 41-2)

On this point appellees rely upon the reconstructed picture of the collision prepared by Mr. Alderson, who they say measured "the angle of impact". (Ap. III, p. 1385) This diagram, it will be noted, lays out the hull of the Olympic exactly as if she were a rectangular box car. If the point of penetration were proven (and Olympic did not produce her diver), it is possible an intelligible drawing could be produced rather than one which simply suited the assumed necessities of Olympic's case. In the molded side of a vessel, penetration to a greater degree on the starboard than on the port bow proves nothing. And even if the exact point of impact were shown, it is entirely possible that the structural strength of, or location of compartments in the vessel collided with might be such as to cause resistance to penetration and consequent scarring to be greater on one bow than on the other.

We stated in our opening brief that, subject to influence of tide and wind, the Olympic was headed 270° true. Counsel, in supporting their acute-angle-collision theory, state she was headed west "magnetic" or 285° true. Let us look at the record. The witness is Captain Andersen, a licensed master and the president of Hermosa.

"Q. Now what was the direction of the axis of the Olympic or her heading as she lay anchored there to Horseshoe Kelp after May 9th. Can you give that to us *in true degrees*?

A. I don't know what you—what you say?

Q. I am trying to ascertain the direction of the heading of the Olympic as she lay at anchor after May 9th.

A. She was heading west, approximately, all the time.

Q. Was that due west?

A. Yes." (Ap. I, p. 380)

The statement that Captain Sato did not know the heading of the Olympic at the time he ordered the hard astarboard

(Br. pp. 42, 43) appears to be an inadvertence of counsel in the light of the record references. (Ap. III, pp. 1227, 1228, 1237) He knew her heading but could not determine her exact position until a few seconds later. The second reference deals with Captain Sato's recollection of the heading of a small boat, not the Olympic.

The experience and qualifications of the Sakito crew entitled their testimony to greater weight.

The authorities sanction a comparison of the experience and qualification of witnesses in collision cases.

The Vulcan (1899) 96 F. 859, aff'd 106 F. 989 (C.C.A. 2), Cert. den. 183 U.S. 700, 22 S. Ct. 936, 46 L. Ed. 396;

The Henry O. Barrett (1908) 161 F. 481 (C.C.A. 3).

In the District Court opinion in the first above cited case, Judge Coxe said:

"In arriving at a correct answer to this question, the court should take into consideration the probabilities and presumptions based upon the skill, knowledge and ability of the crews of the respective vessels. Which of the two would be most likely to make a mistake." (96 F. 860, 861)

The trial court clearly overlooked this rule and counsel seem to assume that there is no such rule. (Br. p. 43) The truth is that there were no competent, qualified navigators who observed this collision except those on the Sakito Maru. Such fact justifies this Court in scrutinizing her testimony most carefully but does not justify the giving of equal weight to the testimony of inexperienced and unqualified observers.

The Olympic's Place of Anchorage.

(Appellees' Brief pp. 44-55)

This subject was fully covered in our opening brief, and need not detain us here except for correction of counsels' statement that the defense area shown on certain charts in evidence

was effective "some time in 1941". The defense area of forbidden anchorage shown on the exhibit Ap. III, p. 1056, was proclaimed by Executive Order No. 8403 signed by the President on May 7, 1940, almost four months before this collision. This collision occurred very close to that defense area, and if the Point Loma was as much inshore of the Olympic; i.e., two-tenths of a mile, as the Olympic claims, she was nearly right on the line. We print the text of the executive order in the appendix.

We are unable to locate the testimony of Captain Arthur referred to on page 45 of appellees' brief. Certainly the record reference "Ap. III, pp. 1336-8" is not accurate. (Br. p. 45). The statement that the area is that in which vessels drop and pick up pilots is not in accordance with the evidence in this case. The area is about two miles from where pilots are generally picked up and dropped. (Br. p. 45) (Ap. II, pp. 635-6)

Whether a vessel following the ten-fathom curve in a fog would pass one mile or five to the east of the barges would depend entirely upon where the vessel encountered fog and determined to take such course. Any such vessel might even have passed the fishing ground before encountering fog. (Br. pp. 45, 46)

The Olympic's Signals.

With respect to section (i) of Article 9 of the International Rules, we assigned as error the failure of the District Court to find that the Olympic II did not blow proper fog signals. (Ap. I, p. 252, Ass. of Err. XII) Failure to sound proper signals by the Olympic II was also pleaded by appellants. (Ap. I, p. 27, par. C) In the circumstances, the rule of

Anderson v. Alaska S.S. Co. (1927) 22 F. (2d) 532, 536 (C.C.A. 9); and

The Golden Gate (1931) 52 F. (2d) 397, 399 (C.C.A. 9),

can have no possible application.

We do not know of any rule or theory of the case that prevents this Court from deciding this question of law. It was brought out in the testimony of the president of Hermosa that they had a manually operated fog horn in operating order aboard the Olympic II which they did not use after the barge was tied up for the season at Horseshoe Kelp. (Ap. I, p. 376)

As remarked in the Second Circuit case, our brief page 23, relating to a moored vessel (assuming the fish-boat-signal statute or the anchored-vessel statute is not here applicable), it is a situation for judge-made law. Whether such judge-made law will take form to apply Article 9(i), Article 15(d), or require such a moored vessel to employ a scout tug or tugs to warn other vessels in foggy weather, is for the court to decide and not for counsel. (Appellees' Br. pp. 55-58) In any event, the Olympic II does not bring herself within Article 9(h) because that Article has application only when a fishing vessel becomes stationary "in consequence of her gear getting fast to a rock or other obstruction". (33 U.S.C.A. Sec. 79)

The General Unpreparedness of the Olympic.

Counsel complain that we suggest the general unpreparedness of the Olympic to take steps to protect herself was a grave fault. Other courts in similar situations have found fault with an anchored vessel for failure to take steps in avoidance of collision. Captain Andersen testified that it was Greenwood's duty to look "after the engines". (Ap. I, p. 387) If the Olympic could have hauled herself as much as 140 feet by moving up on her bow anchor during the period when the Sakito Maru was approaching her under full reversing power, stem on, 664 feet away, collision would have been avoided entirely. Power of self-propulsion was not necessary. This fault clearly goes to the competence of her personnel to deal with emergencies which might be anticipated and is within assignment of errors X and XIII. (Ap. I, p. 252) If the Olympic was equipped to take such

steps as good seamanship required, there is nothing in the record to show it.

Failure of Olympic to have 65% of deck crew able-bodied seamen.

Counsel state that it was the Sakito's burden to establish this negative. But the Olympic pleaded (Ap. I, p. 7):

"The libelant used due diligence to make the said vessel seaworthy and, until the said collision, she was at all times tight, staunch and strong, sufficiently *manned*, equipped and supplied, and in all respects seaworthy and fit for the service in which she was engaged."

We invite the Court to contrast this allegation with the evidence of Captain Andersen as to the Olympic's crew. (Ap. I, pp. 386, 387) In the face of this record, we know of no presumption that a man is an able-bodied seaman simply because he works aboard a vessel. This is not a criminal prosecution, but a civil case where legitimate inferences can be drawn from facts proved in the light of stultifying pleadings of the adverse party.

Next Olympic advances the theory that a vessel complies with the LaFollette Act if she departs from port with a proper crew and then as soon as she has made such departure sends them all back with the pilot and continues on her way with incompetents. Yet we are accused of taking narrow and technical positions.

Background.

Practically all of the material covered by pages 65-69 is "off the record" matter which should not influence this Court's determination. There is no showing that anyone in the Bureau of Navigation had authority to waive inspection laws for the benefit of particular vessels or cases. If they did, or any of them did, it was at most a toleration inimical to the statutes

and hence had no legal sanction. A toleration extended by functionaries of government cannot modify an express law.

United States v. The Forrester (1856) Fed. Cas. No. 15,132 (D.C. Mich.).

The Olympic had no certificate of inspection in force at the time of the collision.

The decision in

United States v. Monstad (S.D. Cal.) 1942 A.M.C. 273, was not, as appellees state, a holding that "the barges were * * * 'not navigated' within the meaning of Section 398, while lying at anchor and serving their patrons as fishing platforms" (Br. pp. 67, 68). It was a holding that one particular barge, the Kohala, anchored for over *four* years in the same locality approximately *one mile* off-shore, was not being navigated when the record indicated no intention immediate or prospective to move her. That was not the situation of the Olympic, even if we assume such decision to be sound.

In the case of

The Princess Sophia (1932) 61 F. (2d) 339, 347 (C.C.A. 9),

appellees quote one sentence on page 73 of their brief. To complete the Court's thought, we quote the sentence following:

"The rule simply is that the violator (of a statute) is penalized with the burden of showing that the violation not only *probably* did not cause the accident, but that it *could* not have done so." (Emphasis by the Court)

Last Clear Chance.

This Court did not, as counsel state (Br. p. 75), apply the doctrine of last clear chance in

Crowley L. & T. Co. v. Wilmington T. Co. (1941) 117 F. (2d) 651 (C.C.A. 9).

The fact is that in that case the Patrick was held not in fault

at all. Accordingly the last-clear-chance doctrine could have no application. It is a doctrine which tempers the rigors of the doctrine of contributory negligence.

The weight of authority as shown in

45 *Corpus Juris*, p. 990,

is far in favor of application of the doctrine only when the plaintiff's peril is known to the defendant. A dozen or more federal cases are there cited in application of this theory of the rule and none in support of the application contended for by appellees' counsel here. It is true that the entire doctrine is generally considered to stem from

Davies v. Mann, 10 M & W 546, 12 L.J. Ex. 10, 6 Jur. 954,

but whether the defendant in that case saw the plaintiff's donkey is a question which, in the obscurity of the decision, never has and never will be settled.

Bulkheading — Sea-going barges — American Bureau of Shipping Standards.

The appendix to appellees' brief (apart from being replete with off-the-record matters) should demonstrate to the Court's satisfaction that the Olympic II was a sea-going barge and that it was the intention of Congress to regulate her as such irrespective of classic definition. (Appendix to Appellees' Br. pp. 3, 4, and 5) The trial court's decision completely overlooks these matters and the doctrine of elasticity of words. (Ap. I, pp. 133-135)

Massachusetts P. Ass'n. v. Bayersdorfer (1939) 105 F. (2d) 595, 597 (C.C.A. 6)

"Words, after all, are but labels whose content and meaning are continually shifting with the times. *Towne v. Eisner*, 245 U.S. 418, 425, 38 S. Ct. 158, 62 L. Ed. 372, L.R.A. 1918D, 254."

Adopting the practice of appellees' counsel and in endeavor to acquaint the Court with the American Bureau standards as relate to the Olympic's bulkheading, we quote in a second appendix a certain section of our reply brief in the trial court. This material, we think, answers the contentions of appellees' brief, page 71.

CONCLUSION.

Reviewing appellees' brief in its entirety, we see no occasion to depart from or to re-state the conclusions stated at page 71 of our opening brief.

January 7, 1943.

Respectfully submitted,

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(APPENDICES FOLLOW.)

Appendix I

EXECUTIVE ORDER No. 8403

May 7, 1940

ESTABLISHING LOS ANGELES - LONG BEACH HARBOR NAVAL DEFENSIVE SEA AREA

California

By virtue of and pursuant to the authority vested in me by the provisions of section 44 of the Criminal Code, as amended (U.S.C., title 18, sec. 96), all that area of water seaward of the mean low-water line in the Pacific Ocean easterly of a line bearing 147 degrees true from Point Fermin, California, and northerly of a line parallel to and 6,000 yards distant from the axis of the Los Angeles-Long Beach detached breakwater, extending eastward to Sunset Beach, California, except Los Angeles Harbor, Long Beach Inner and Outer Harbors, and all anchorage areas defined and established by the Secretary of War, is hereby established as a naval defensive sea area for purposes of national defense such area to be known as the Los Angeles-Long Beach Harbor Naval Defensive Sea Area.

At no time shall any vessel or other craft (other than public vessels of the United States and of the State of California, and merchant vessels and small craft during a fog or an emergency as hereinafter provided) be anchored within the defensive sea area above defined unless authorized by the Secretary of the Navy.

Merchant vessels and small craft may anchor in the defensive sea area during a thick fog or in an emergency of such nature as to require anchoring therein to prevent serious damage. Such merchant vessels and small craft shall leave the area on or before the passing of the fog or emergency: *Provided, however,* that, in the discretion of the Secretary of the

Navy, any such merchant vessels or small craft may be required to leave or to be towed out, immediately or at any time, without expense to the United States.

Any person violating the provisions of this order shall be subject to the penalties provided by law.

FRANKLIN D. ROOSEVELT

The White House,
May 7, 1940.

Appendix II

STATUTORY VIOLATIONS.

In our Opening Brief (pp. 42-43) we have pointed out the requirements of the inspection statutes applicable to seagoing barges (46 U.S.C. 395) and "all other vessels and barges of over 100 tons burden carrying passengers for hire" (46 U.S.C. 391). We have emphasized ("Sakito's" Opening Brief, pp. 43-44) that these statutes require the local inspectors to "satisfy themselves that such barge is of a structure suitable for the service in which she is to be employed, * * * and is in a condition to warrant the belief that she may be used in navigation with safety to life".

It was in the exercise of the discretion thus reposed in the local inspectors that they reached the conclusion that the "Olympic II", to be safe and suitable to be used by the numbers of pleasure fishermen who would frequent her, should meet the requirements outlined in the specifications accompanying their letter to Captain Andersen. Counsel for Hermosa have disregarded these statutes and this repose of discretion in the local inspectors entirely in their opening brief and have based their attack upon the proposition that these requirements were not of the stature of regulations promulgated by the Bureau of Marine Inspection and Navigation under 46 U.S.C. 375.

This disregard of Sections 391 and 395 is made more pointed by the length to which counsel stretch their argument based on Section 375, and the general rules promulgated thereunder. Counsel's description of the seagoing barge statutes (Hermosa's Opening Brief, p. 49, lines 4-9), moreover, is not a fair statement of the inspection requirements, for it fails to state the very words giving sanction and force to the action of the local inspectors.

After maintaining up to this point that the "Olympic" was a fishing barge, counsel now assert that she was seaworthy because she met the statutory bulkhead requirements for sailing vessels and because there were no statutory requirements specifically detailing the bulkheads necessary in a barge. Again, this overlooks entirely the discretion wisely reposed in the local inspectors in every inspection district to *satisfy themselves* that a barge is "of a structure suitable for the service in which she is to be employed * * * and is in a condition to warrant the belief that she may be used in navigation with safety to life". Obviously, this discretion was lodged in the local inspectors in the first instance to provide the flexibility necessary in meeting particular situations and in assuring safety requirements suitable for particular types of barges. No one will suggest, for example, that a barge such as the "Olympic", anchored on the high seas and providing resort for pleasure fishermen in large numbers, would require the same safety precautions that a coal barge on the Great Lakes would. Just as the Lord High Executioner's purpose in "The Mikado" was to "make the punishment fit the crime", so the purpose of the statutes was to make the safety requirements fit the needs of particular situations.

Counsel for Hermosa argue (Hermosa's Opening Brief, p. 51), in disregard of the express provisions of 46 U.S. 391 and 395, that the local inspectors' duties are purely ministerial, that they have no discretion, because if they did have dis-

cretion, each of the 48 Boards of Local Inspectors might promulgate conflicting minimum requirements and a vessel which passed inspection in San Francisco "would be banned when she reached New York". This is ridiculous. An orderly system of appeal from decisions of the local inspectors is provided (46 U. S. C. 391, 431, et seq.), and no more confusion can result than results from diverse decisions of local United States District Courts, from which appeals may be taken and in connection with which appellate procedure provides for reconciliation of differences of local opinion. As a matter of fact, the appellate procedure provided was followed in the "Olympic's case, and the requirements of the local inspectors were confirmed (Hermosa's Opening Brief, p. 55).

It is suggested (Hermosa's Opening Brief, p. 52) that the local inspectors were wrong because Rule VI, subdivision 14 (46 C. F. R. 63.14) provides that the rules of the American Bureau of Shipping shall be the standard of inspection and because the American Bureau of Shipping required only one collision bulkhead not less than 5 feet aft of the stem at the loadline of a sailing vessel and the Bureau had no requirements or recommendations as to bulkheads for barges. This contention is adequately disposed of by the official action of the Bureau of Marine Inspection and Navigation, confirming the decision of the local inspectors which imposed the bulkhead requirements in question upon the "Olympic". Nevertheless, lest the Court consider there is substance in counsel's contentions, we will briefly discuss the American Bureau of Shipping's rules and regulations. In the first place, they have no application to vessels constructed of iron, of which the "Olympic" was made. The full title of the rules is: "American Bureau of Shipping Rules for the Classification and Construction of *Steel* Vessels," and they provide:

"The Rules and Tables, except where otherwise specified, are intended for vessels to be constructed of mild *steel*, manufactured and having the physical properties as specified in Section 39. * * * Where it is intended to

use *iron*, steel or other material having physical properties differing from those specified in Section 39, the use of such material and the corresponding scantlings are to be specially considered."

American Bureau of Shipping Rules for the Classification and Construction of Steel Vessels, 1940, sec. 3, p. 5.

Obviously, the requirements for vessels to be constructed of steel under modern specifications of that material provide no standard whatsoever for an iron vessel built in 1877. Moreover, the classification rules do not provide an inflexible standard, even for steel vessels. In the section dealing with bulkhead requirements, the rules provide:

"All vessels of ordinary type and normal form should be provided with strength and watertight bulkheads in accordance with this section; in vessels of special type where adherence to those rules is found to be impracticable, the arrangements will require to be specially approved."

Ibid., sec. 12, p. 31.

Although there is special mention of screw vessels, sailing vessels, and vessels with machinery spaces, no mention is made of barges. Even if the "Olympic" were built of steel and within the subject matter covered by the classification rules, it would be subject to special consideration inasmuch as there is no specific mention of barges and the "Olympic" was not of "ordinary type and normal form". It was a vessel "of special type", once a sailing vessel but that no longer, in short, of the very amorphous nature for which the flexibility of the classification rules left provision.

Even as to steel vessels covered by the classification rules, counsel for the "Olympic" have misstated the bulkhead requirements. The rules provide generally:

"All vessels should have complete transverse bulkheads extending to the strength deck, spaced not over 100 feet apart. This should be accomplished by the fitting of sub-

stantial transverse 'tween deck bulkheads immediately over the main watertight bulkheads."

Ibid.

And the specific requirement of collision bulkheads in sailing vessels is not, as counsel assert, that such bulkhead be not less than 5 feet aft of the stem, but that it be not less than .05 of the vessel's length abaft the stem.

Ibid.

The statements that the decision of the inspectors was motivated by a desire to curb the operation of gambling ships (Hermosa's Opening Brief, p. 54) is purely speculative. The gambling vessels had all ceased operation before the local inspectors' letter of June 3, 1940, was sent to Captain Andersen. They had been swept out of operation by a decision of the California Supreme Court in November, 1939. Furthermore, the local inspectors' requirements were reasonably designed to promote the safety of life aboard the "Olympic" and the other fishing barges and upon the "Olympic's" own appeal were sustained by the Bureau of Marine Inspection and Navigation at Washington.

There is also the presumption that the inspectors acted rightly in the exercise of the discretion and authority lodged in them by statute and that their action was proper and lawful.

Butler v. Maples, 76 U. S. 766, 19 L. ed. 822.

"All reasonable presumptions must be indulged in support of the action of the officers to whom the law intrusted the proceedings resulting in the patent, and unless it clearly appears that they committed some material error of law, or that misrepresentation and fraud were practised upon them, or that they themselves were chargeable with fraudulent practices, and that, as a result, the patent was issued to the defendant when it should have been issued to the plaintiff, their action must stand."

Ross v. Stewart, 227 U. S. 530, 535, 57 L. ed. 626, 629; 1 Jones, *Evidence* (4th ed.), secs. 41-42, 45.

No. 10,190

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

STERLING CARR, as Trustee in Bankruptcy
of NIPPON YUSEN KABUSHIKI KAISYA,
a Corporation, Bankrupt, and FIDELITY
AND DEPOSIT COMPANY OF MARYLAND,
a Corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD.,
a Corporation, and J. M. ANDERSEN,

Appellees.

(And Fourteen Consolidated Appeals.)

Appellants' Memorandum of Points and Authorities
Relied Upon In Opposition to Motion
to Dismiss Certain Appeals

FILED

FEB - 3 1943

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Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD.,
a Corporation, and J. M. ANDERSEN,

Appellees.

(And Fourteen Consolidated Appeals.)

**Appellants' Memorandum of Points and Authorities
Relied Upon In Opposition to Motion
to Dismiss Certain Appeals**

Appellees, Hermosa Amusement Corporation, Ltd., and J. M. Andersen, parties in each of the fourteen cases, move to dismiss the appeals in this cause other than the appeal in the main proceeding. Their motion is based upon two grounds, (1) lack of summons and severance as to libel-

ants and/or intervening libelants “named in the decrees* appealed from”, and (2) the lack of necessary parties “in the decrees* appealed from.”

I.

FACTS.

“Without prejudice to any other matter”, counsel for Hermosa Amusement Corporation, Ltd., and J. M. Andersen stipulated that the decrees to be entered in causes B, D, E, F, G, H, I, J, L and M, made “reasonable awards” to the several claimants. These were respectively the Mayo, Karsh, Johnson, Montgomery, Elliott, Culp, Greenwood, McGrath, Anderson and Sylvester decrees. (Stipulation, Ap. I, pp. 140-144) (Appellees’ motion, pp. 2 and 3). Only the Berger, Ohiser and Rasmussen decrees were not covered by this stipulation. They are designated respectively C, K and N. Thus it appears that in ten of the causes the amount of damages was fixed by agreement between appellants and the libelants or intervening libelants upon appellees’ stipulation in this cause that the amounts so stipulated were “reasonable awards for the above described damages suffered by the respective libelants, occasioned by the collision.”

It was also stipulated (Ap. I, pp. 277, 278) that the record on appeal in cause A, the main proceeding as to which no motion to dismiss is presented, should consist of the following documents among others:

*Italicized additions ours.

“11. Amended petition to bring in third party respondents filed May 13, 1941. (Ap. I, pp. 55-71)

* * *

“14. Answer to amended petition to bring in third party respondents. (Ap. I, pp. 75-89)

* * *

“17. Answer of third party respondents to intervening libels. (Ap. I, pp. 97-108)

“18. Amendment to amended petition to bring in third party respondents and order authorizing the same dated September 19, 1941.” (Ap. I, pp. 108, 109)

All of the above documents are stipulated to be a part of the record in cause A, the main case, to which the motion to dismiss is not directed. (Appellees' motion, p. 6) The amounts of the stipulated decrees are also, as above noted, disclosed by the record in the main cause. (Ap. I, pp. 140-144; id. p. 278) In the said main cause appellants assigned as error the failure of the District Court to enter judgment in favor of them “on the petition under the 56th Admiralty Rule in the above entitled and consolidated causes.” (Ap. I, p. 251) No error was assigned by appellants as to the amounts awarded by the decrees in causes C, K and N, or in any other case except cause A, and that assignment of error was withdrawn. (Ap. I, pp. 272-273)

It appears to us that the portion of the record on appeal in cause A alone, as to which no motion to dismiss is made, is adequate to a determination as between appellants and appellees of all matters arising in that cause and in each of the consolidated causes. As between appel-

lees who make this motion and appellants and all parties to the consolidated causes, a reversal of the judgment below would leave open to the further contention of such appellees only the amounts of the decrees in causes C, K and N, in which the amounts were not stipulated.

The present motion to dismiss is presented to this Court despite the stipulation signed by all proctors for appellees now making such motion:

“A. That the appeals in the above entitled causes *may and shall* be consolidated and *heard, considered and determined* together.*

“B. That the record and Apostles on appeal heretofore consolidated by stipulation and order, may be printed in one consolidated record.

“C. That a single set of briefs may be served and filed by the appellants and that a single brief may be served and filed by the appellees, covering all of the appeals in said causes and based on said consolidated record.” (Ap. III, pp. 1416, 1417)

That stipulation is captioned in this court and cause and its title refers to consolidated cases. (Ap. III, p. 1415)

II.

POINTS AND AUTHORITIES.

(a) The Doctrine of Summons and Severance is Obsolete.

Counsel concede at the outset that the Federal Rules of Civil Procedure (Rule 74) abolish the necessity for summons and severance and state that such rules have no

*Emphasis supplied.

application in admiralty. They do not point out, however, that Rule 48 of the General Rules of the Supreme Court adopted in 1939 provides:

“Parties interested jointly, severally, or otherwise in a judgment may join in an appeal or a petition for a writ of certiorari therefrom; or, without summons and severance, any one or more of them may appeal or petition separately, or any two or more of them may join in an appeal or petition.”

(Except for reference to petition for certiorari, this rule is the same as Rule 74 of Federal Rules of Civil Procedure.)

Rule 9 of this Circuit provides:

“The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.”

The doctrine of summons and severance appears to have originated in

Williams v. Bank of the United States (1826) 24 U.S. 414, 6 L. ed. 508,

a decision of Marshall, C.J. It was brought more forcefully to the attention of the bar by the opinions of Mr. Justice Miller in

Masterson v. Howard (1869) 10 Wall. 416, 19 L. ed. 953,

and of Mr. Justice Blatchford in

Estes v. Trabue (1888) 128 U.S. 225, 32 L. ed. 437, 9 S. Ct. 58.

The decisions in the above cases and other decisions in actions at law and in equity were followed in like actions

in the several Circuit Courts of Appeals. They were followed in admiralty in the Fifth Circuit only. Decisions of the Fourth, Sixth and Ninth Circuits had not applied the technical doctrine. See note to

Hartford A. & Ind. Co. v. Bunn (1932) 285 U.S.
169, 76 L. ed. 685, 52 S. Ct. 354,

published in

1932 A.M.C. 854-858.

The decision in admiralty in this Circuit in which the doctrine of summons and severance was held inapplicable was

Perriam v. Pacific Coast Co. (1904) 133 F. 140
(C.C.A. 9).

This case and those from the other Circuits held that a stipulator against whom a joint decree was rendered did not become a party to the action. Yet it was patent that such a surety's rights would be as much affected by a reversal as those of the principal.

The change in practice effected by the adoption of the Federal Rules of Civil Procedure was noted by this court in

Tighe v. Maryland Casualty Co. (1938) 99 F. (2d)
727 (C.C.A. 9)

but such rules were held inapplicable to an appeal pending prior to their effective date. The change in the rule as to summons and severance was, however, apparently not noted here in the decision of

Interstate Oil Co. v. Gormley (1939) 105 F. (2d)
431 (C.C.A. 9)

but in that case the court indicated that it would *sua sponte* issue citation to any necessary party if the appeal then before it appeared well founded. This decision accords with the spirit of the decision in

In re Barnett (1942) 124 F. (2d) 1005 (C.C.A. 2)

where the court said, at page 1009:

“We have jurisdiction in the premises. Several courts have recognized that, where reversal of a judgment wipes out all basis for recovery against a non-appelling, as well as against an appealing, defendant, the reversal may operate to the benefit of both. *Kline v. Moyer*, 325 Pa. 357, 191 A. 43, 111 A.L.R. 406; *Gebhardt v. Village of La Grange Park*, 354 Ill. 234, 188 N.E. 372; *Maryland Casualty Co. v. City of South Norfolk*, 4 Cir., 54 F. 2d 1032; and cf. *Merchants Discount Corp. v. Federal Street Corp.*, 300 Mass. 167, 14 N.E. 2d 155, 118 A.L.R. 412; *Rowell v. Ross*, 89 Conn. 201, 93 A. 236; 5 C.J.S., Appeal & Error, Sec. 1920, p. 1423; 3 Am. Jur. 695; *Shreeder v. Davis*, 43 Wash. 129, 86 P. 198, 10 Ann. Cas. 80; L.R.A., N.S., 310.

“In such a case as this, we should, then, consider the parties to the order below as before this court, at least to the extent that where modification of the judgment affecting them is necessary in order to afford proper and adequate relief to appellant, they are bound thereby.”

It appears to us that in the light of the foregoing authorities, were this motion otherwise well-founded it would be an anomaly and an anachronism for this court to follow a doctrine repudiated by the very court which announced it and in virtue of whose decisions it has

filtered down through the several circuits. The decisions cited by appellees indicate that the objection of want of necessary parties is but one of the aspects of the old doctrine of summons and severance.

(b) The Interests of Appellees Other Than Those Making the Present Motion Were Clearly Several.

It is perfectly plain that appellees Hermosa and Andersen had no property right or interest in any amount which the decrees under review awarded to any of the Olympic II's passengers or crew. Any might have failed to sue or intervene and the action would not have abated because the claims of the several injured parties were not joint. The decrees cannot be joint in substance, as appellees assert, when the claims are not so in fact. All that is "joint" is the fact that certain common questions of law and fact were presented which could be conveniently disposed of in one proceeding.

But even the issues of law and fact were not entirely identical, as appellees infer. It was quite possible as to the legal issues that the court determine that the Olympic II's condition as to maintenance and seaworthiness was the sole proximate cause of the loss to her owners. It would not follow from this that her negligence would be imputed to her passengers and even perhaps to her crew so that they, or their representatives, could not recover from the Sakito Maru if she were in fault for their unfortunate losses. Likewise as to facts—proof that Culp and Greenwood lost their lives, essential to the individual claims of their representatives, was not in any way pertinent to the establishment of any claim of the Hermosa

Amusement Corporation, Ltd., or J. M. Andersen against the appellants.

The record indicates (Ap. I, pp. 282-288; Ap. III, p. 1425) that citations issued in the consolidated causes and were served on appellees presenting this motion.

In the light of the foregoing we respectfully submit that the motions to dismiss appeals B to N inclusive herein are not well taken, and that such motion ought to be denied as to each said appeal.

DATED: February 3, 1943.

Respectfully submitted,

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No. 10190.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

STERLING CARR, as Trustee in Bankruptcy of NIPPON
YUSEN KABUSHIKI KAISYA, a Corporation, Bankrupt;
and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
a Corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD., a Corpora-
tion, and J. M. ANDERSON,

Appellees.

(And Thirteen Consolidated Cases.).

APPELLEE'S PETITION FOR REHEARING.

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No. 10190.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
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Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD., a Corpora-
tion, and J. M. ANDERSON,

Appellees.

(And Thirteen Consolidated Cases.)

APPELLEE'S PETITION FOR REHEARING.

*To the Honorable William Denman, Clifton Mathews
and Albert Lee Stephens, Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

The appellee herein, Hermosa Amusement Corporation, Ltd., respectfully petitions for a rehearing of the appeals herein, and a re-examination of those aspects of the consolidated cause whereby this petitioning appellee was held liable to the appellants for one-half of the amounts of the judgments against the latter for deaths and loss of personal effects.

The rehearing is sought upon each of the following grounds:

1. This Court has evidently overlooked or failed to appreciate the trial court's finding to the effect that the "minimum requirements" of the local inspectors (which included the transverse bulkhead requirement) promulgated on June 3rd, 1940, had not been enforced and that the owners of the involved vessels were given a reasonable time to comply with the same. [A. 1. 132.] This finding necessarily implies that on September 4, 1940, the "reasonable time" had not expired, and that the bulkhead requirements were not binding upon OLYMPIC. The evidence strongly supports that finding and its said implications, and should be decisive of this aspect of the case.

2. The local inspectors' minimum requirements of June 3, 1940, were *ultra vires* and void, and, in effect or not, had no binding effect upon OLYMPIC. The function of local inspectors is to inspect and to apply the standards and requirements fixed by law and generally accepted concepts of seaworthiness. Local inspectors are without authority to extend or amplify those standards and requirements.

3. The burden of proof of the *Pennsylvania* is not applicable to a fault which is not a violation of a statute, or a rule to which Congress has given the force of a statute. Even if the bulkhead requirement was valid and in effect, as an administrative order, the burden of the *Pennsylvania* rule was not imposed.

4. The lack of cross bulkheads in OLYMPIC was not legally causative of the deaths or losses of personal effects.

These points are elaborated in the following discussions.

Point One.

By the decision in *United States v. Monstad*, 134 Fed. (2d) 986, it is the law in this circuit that pleasure fishing vessels of the OLYMPIC's type are subject to inspection as sea-going barges. For the purpose of this petition we accept that decision, and do not dispute that on September 4, 1940, OLYMPIC was subject to inspection. She had not been currently inspected, as directed by U. S. Code, Title 46, Sec. 395, and did not have on board the certificate of inspection as required by Sec. 398.

Section 395 requires that at least once a year the local inspectors shall inspect each sea-going barge and "satisfy themselves" that the barge is of a structure suitable for the service in which she is engaged, etc. Assuming, argumentatively, that thereby the burden and duty is imposed upon OLYMPIC to submit herself for inspection and satisfy the inspectors as to her condition, we agree in advance that the duty to submit to inspection, and to procure a certificate, is a duty imposed by law, which cannot be waived or nullified by the failure of the inspectors to make inspections or otherwise. See *City of Los Angeles v. United Dredging Co.*, C. C. A. 9, 14 Fed. (2d) 364. So, we do not claim that the failure of the inspectors to inspect the OLYMPIC, purged her of any violation of Sec. 398, or of any obligation imposed upon her by Section 395.

We do not understand that this Court has imposed upon OLYMPIC the burdens of the *Pennsylvania* rule merely because she failed to submit herself to inspection or because she did not have a certificate on board. It has imposed that burden because she did not have the transverse bulkheads which the local inspectors presumably

required before they would "satisfy themselves" as to her suitability.

It is necessary, of course, to impose the burdens of the *Pennsylvania* rule upon OLYMPIC, that she be found guilty of some specific and transitive fault which could have had causal effect upon the losses. The mere failure to be inspected and to have a certificate on board may be violations of statute, but they are, as far as any consequences are concerned, entirely passive and non-operative. To vitalize and give operative effect to these violations we must find some specific defect, or the omission of a valid requirement. This Court has held that the lack of bulkheads supplied such operative violation.

This Court postulates that as the pleasure fishing vessels had been made subject to inspection by Congress, the making of requirements, such as the bulkhead requirements, had been specifically delegated to the local inspectors by Congress. Accepting that, argumentatively, it must rest upon the proposition that the local inspectors are empowered to prescribe such requirements as they deem necessary to "satisfy themselves" that the structure of the vessel or vessels is suitable for their intended service. If the inspectors, in the course of their administrative function, have power to prescribe such requirements as bulkheads, etc., it must necessarily follow that they have power to prescribe *when* they shall become effective and be applied; to suspend them when they deem it advisable; and to repeal or abrogate them or abandon them when they can "satisfy themselves" by other means or other considerations.

It is undisputed that prior to June 3, 1940, at least, the inspectors had been "satisfied" to accept and pass these vessels without transverse bulkheads, and had ac-

cepted, as standard and proper construction, the conventional sailing ship design with one collision bulkhead, forward. The bulkhead requirements of June 3, 1940 were new and revolutionary, and indicated that the old standards would no longer be sufficient to "satisfy" the local inspectors. At some time, therefore, by the will of the local inspectors, the old standards would cease to "satisfy them," and the new standards would become effective. If that time had not come on September 4, 1940, when the accident happened, then it must follow that the old standards still governed inspections, and OLYMPIC, if inspected, would have satisfied the inspectors and would have passed and received her certificate.

If the bulkhead requirement, although promulgated on June 3, 1940, was not in effect or being enforced when the accident occurred, and its taking effect had been postponed until after the date of OLYMPIC's loss, it must be that she was guilty of no statutory or rule fault in not having bulkheads, and there was nothing to bring the *Pennsylvania* rule into effect. The question as to whether the new bulkhead requirement was intended by the inspectors to be effective on September 4, 1940, was and is vital and essential to the proper determination of this aspect of the case.

The trial Court, upon the evidence, determined that at the date of the accident, the requirements had not been put into effect, and so found. The appellant assigned the finding as error, but did not press the assignment in its briefs in this Court. We discussed the question very briefly in our reply brief (pp. 66-7), but apparently this Court, concerned with the question of the validity *per se* of the inspectors' minimum requirements, over-

looked this finding and the evidence supporting it. Neither the finding, the assignment of error nor the evidence is mentioned in this Court's opinion, although the finding, as heretofore indicated, is essential in a decision of the case.

The trial Court ordered its opinion to stand as the findings of fact and conclusions of law. In that part of it dealing with inspections and the bulkhead requirements, the Court reviewed the history of the inspection problem, the activities of the Bureau of Inspection, and then referred to the inspectors' promulgation of the "minimum requirements" of June 3, 1940, which include the bulkhead requirement. [A. I. 131-2.] The Court then found:

"However, these requirements had not been enforced, and the owners of these pleasure vessels were given a reasonable length of time to comply with the same." (*Id.* 132.)

Certainly, the plain intendment of that finding is, that the *minimum requirements* had not yet been put in effect by the inspectors or the Bureau of Marine Inspection and Navigation, and that when the accident occurred, the "reasonable length of time" had not yet expired as to OLYMPIC.

Counsel for the appellant fully appreciated and accepted that as the necessary implication, for they assigned the finding as error, in the following language:

"The District Court erred in finding that the minimum requirements specified for the OLYMPIC II by the U. S. Local Inspectors * * * were not enforced, and that the owners of the OLYMPIC II *were not obliged* to comply with such minimum requirements *at the time of the collision*," [Finding XI, A. I. 253.]

The question as to whether the new requirements were in effect was and is purely factual. The burden of proof of showing the present existence of a statutory fault was with the appellant, for although the *Pennsylvania* burden is upon an offending vessel to show that her statutory violation could not have *contributed*, the burden of showing the *existence* of the statutory fault is upon the party asserting it. To show an operative fault in this case, the appellant had to establish, by a preponderance of evidence, that the bulkhead requirement was intended to be effective and enforced on the day of the accident.

The appellants failed in their burden. They introduced the inspectors' notice of June 3, 1940, containing the minimum requirements, and the admission that they had been received by Hermosa [A. I. 388-402], and procured the admission of Captain Andersen that at the time of the loss OLYMPIC only had her regular collision bulkhead. [*Id.* 405.] That was their entire proof on the proposition that the bulkhead regulation was presently effective. After we had shown that, although the new requirements were promulgated on June 1st, 1940, the inspectors had not moved to inspect OLYMPIC or other barges, and had produced in evidence the letter of Commander Field, Director of the Bureau of Navigation to the Secretary of Commerce, stating that "a reasonable length of time" had been given to OLYMPIC to comply with the new requirements, the appellants then introduced a letter written to their counsel by Captain Fisher, Supervising Inspector, in which he stated vaguely that his file showed "no record of a relaxation" of the requirements as to OLYMPIC, and that he had no recollection of granting any relaxation. [A. III. 1060.] That is the sum

of appellant's proof that the requirements were intended to be effective on September 4, 1940. The local inspectors, although readily available, were not called by appellants.

The inspectors' notice and the minimum requirements contain no reference as to when the latter should become effective, and no inference can be drawn therefrom, except, possibly, that they were to become effective *eo instante*. But if any such inference is considered, it must yield, not only on account of its inherent unreasonableness, but also upon the positive statement of the Director of the Bureau, that the effective date of the new regulations was to be after a "reasonable length of time" to enable the vessels to comply with them.

The season for these pleasure barges runs from about the middle of May until just after Labor Day in September. OLYMPIC went to her anchorage on May 9th, and intended to return to port within a few days after the day of the accident. On June 3rd, when the minimum requirements were promulgated, without previous warning, the OLYMPIC and the other barges were on their stations, and, by radio and other advertising, had established their "good will" for the season. It is obvious that if the new requirements were intended as immediately effective, it meant that every vessel would immediately have to abandon her season and head for a shipyard for weeks of work. None of them had the required transverse bulkheads or fire protection system, to mention only two of the new requirements. No vessel could possibly survive inspection if the new standards were to be forthwith applied.

There was no emergency which called for or justified the immediate imposition of the new requirements. They

had evidently been under consideration and formulation for a couple of years. Certainly without an expressed intention, it may not be assumed that the inspectors intended to put the entire pleasure fishing fleet out of business for the season, and bring heavy loss, if not financial ruin, upon these operators.

A perusal of the shipping statutes and rules of the Board of Supervising Inspectors will disclose that it has ever been the policy of Congress and of the Bureau to give ample warning and notice of the taking effect of new requirements involving substantial expense to owners. When Congress adopted the bulkhead statute, applying to steam passenger vessels (46 U. S. C. A. 482), it excluded from the requirements all vessels built prior to the effective date of the statute, and in most of the rules of the Board of Supervising Inspectors, calling for additions or changes in structure or equipment, the effective date of the rule is put months ahead. In this case, the inspectors' conduct and Commander Field's letter tell us that the inspectors and the Bureau were following that same policy.

If the inspectors had intended the new requirements to be effective *eo instante* we should undoubtedly have seen them immediately using all the resources of the Bureau of Navigation and of the Department of Justice to make them so. But, following the promulgation of the minimum requirements on June 3, 1940, the inspectors did absolutely nothing. As far as we can learn, they did not inspect or reject a single one of the dozen or more pleasure fishing barges in the district. We know they did not inspect or reject OLYMPIC. They simply waited, evidently for the expiration of the season, which, by all

reason, would mark the end of the "reasonable length of time"; for then all vessels would go into port for the winter lay-up, and their earnings for the year would be over.

At this point may we draw parenthetical attention to an inaccuracy of fact in this Court's opinion? It has said:

"Hermosa failed to install the bulkheads, and the inspectors *refused* their certificate."

As a matter of fact the inspectors did not *refuse* a certificate. They never inspected OLYMPIC, and neither refused or granted a certificate. They simply promulgated their minimum requirements, and thereafter did absolutely nothing. No vessel was ever refused a certificate upon the ground that she did not comply with the minimum requirements.

It will be recalled that between the promulgation of the minimum requirements and the accident, Hermosa had appealed to Commander Field, complaining that the new requirements were economically impossible. [A. II. 789.] Commander Field denied the appeal, holding that the new requirements were "reasonable." [*Id.* 744.] The appeal and decision dealt with the minimum requirements substantively, but there is no implication therein that anyone considered the requirements presently in effect. His letter to the Secretary of Commerce shows conclusively that Commander Field and the Bureau did not consider them in effect then or at the date of the accident. Such also was the understanding of Captain Fisher, Supervising Inspector, as disclosed by his undenied conversation with Hermosa's people in San Francisco, when he said that "I don't want to put everybody out of work, so we may be able to work something out

when I come to San Pedro.” [A. I. 403.] This testimony by Captain Andersen was not denied.

But what clinches the matter in our minds and undoubtedly settled it in the mind of the trial Court, was Commander Field’s letter of March 24, 1941 to the Secretary of Commerce, which we have frequently referred to. Let us now examine that letter and its implications carefully.

The record in the trial Court in connection with its admission appears at A. II, 779-787, the text of the letter being on pages 785-7. An “A” Board, which consisted of Miss Phillips of the Department of Justice and Captains Fisher and Alger, Supervising Inspectors of the Bureau, had been convened to investigate the OLYMPIC’s loss. Its report, rendered to the Bureau, had been received, and Commander Field was passing the report to the Secretary of Commerce. A passage in the report inferred that Hermosa had been remiss in failing to make the structural changes provided by the minimum requirements. Commander Field knew that was not true, so, to correct the misimpression, he wrote his letter to his Department Chief, fully explaining the situation. After quoting the pertinent part of the Board’s report, he stated that, after conferences, the officials of the Bureau had decided that these barges were subject to inspection, had issued instructions covering the inspection thereof, and had notified the owners accordingly. He then said:

“It was not deemed equitable, however, to require that the vessels *immediately* comply with the rigid requirements of inspection, and, therefore, the owners were given a reasonable length of time in which to comply with the *requirements* placed upon them. *This was true in the case of the OLYMPIC II.*”

This letter is endorsed: "Accepted: Robert H. Hinckley, Acting Secretary of Commerce." It is admitted to be genuine. [A. II. 785.]

This letter was in no way motivated by this litigation. Indeed, Hermosa and its counsel were not aware of its existence until just before the trial. It was simply the act of a conscientious administrator who wanted the Secretary of Commerce to have the true picture of the situation.

To us, this letter is conclusive that the minimum requirements were not in effect or intended to be in effect by any one in the Bureau of Navigation, from the local inspectors to the head of the Bureau. The trial Judge must have found it equally conclusive, for he cast his finding in the very language of Commander Field's letter.

Commander Field was Director of the Bureau of Navigation, charged by statute with the duty to "superintend the administration of the steamboat inspection laws * * * and produce a correct and uniform administration of the inspection laws, rules and regulations." (46 U. S. C. A. 372.) Certainly, no one could speak with greater authority concerning the official acts and intentions of the Bureau and of its board or subdivisions. It will be noted that he speaks of a conference between members of the Bureau and decisions reached thereat, and that a "reasonable length of time" *was given* to the owners, including OLYMPIC's owners, to comply with the *requirements*. Certainly, he thus speaks of the official acts and intentions of the local inspectors, and of whomsoever else in the Bureau whose concurrence was necessary to give their acts official force.

It is true that neither Commander Field's letter nor the trial Judge's finding says, in so many words, that the "reasonable length of time" had not expired on September 4th, but if the language of the letter or the finding is to be deemed other than purposeless, such meaning must be taken as intended. The Commander's letter would be meaningless unless he had intended to convey the idea that the reasonable time had not expired on the date of the accident, and the Court's finding would lose all significance without the same intention.

We submit that, by overwhelming preponderance of evidence, it was established that the reasonable length of time had not expired, and that the minimum requirements were not intended to be effective as to OLYMPIC on the date of the accident. There is a clear inference, under all the evidence, that the reasonable length of time contemplated by the inspectors and the officials of the Bureau, was co-extensive with the current fishing season.

We need not remind this Court of its own reiterated rule as to the presumptions in favor of a trial Court's findings on issues of fact, and its consistent holdings that it will not reverse on factual issues, unless the findings are contrary to the weight of evidence. We cannot believe that this Court has consciously ignored this vital issue of fact, or that, after review, it will find that the great weight of evidence is not with the trial Judge's finding.

We have conceded, argumentatively, the substantive validity of the local inspectors' minimum requirements. It will be understood, of course, that the concession does not "go," except for the purposes of the instant discussion. If the minimum requirements were not effective on September 4, their validity or invalidity is immaterial,

for even valid requirements of the local inspectors could not impose the burdens of the *Pennsylvania* rule if they had not yet been put into effect. As we see it, therefore, unless this Court holds, upon the evidence, that the minimum requirements *were in effect* on September 4, 1940—all questions as to the validity of the bulkhead requirements are out of the case, and the trial Court's decrees should be affirmed as rendered.

There should be no thought that we are making any claim that the Bureau or the local inspectors did or could relax the requirements of statute that the pleasure fishing vessels be inspected as sea-going barges. The *Monstad* decision by this Court determines, as a matter of law, that they were subject to inspection, regardless of what *Hermosa* or the Bureau or the inspectors currently thought about it. We concede that the duty to inspect and the obligation to submit to inspection could not be avoided or waived by any non-action by the inspectors or by *Hermosa*. She should have been inspected. But until the new standards of the minimum requirements came into operative effect, no vessel could legitimately be inspected by those standards, and no vessel could be legitimately rejected because she did not have transverse bulkheads. The taking effect of the new requirements was not determined by law, but by the will of the local inspectors and of those entitled under the law to approve, disapprove or review their acts. The making of these minimum requirements, says this Court, is an administrative function. So, we submit, is the decision as to when they shall go into effect.

Point Two.

The *Pennsylvania* rule has been on the books for seventy years, and has been cited and applied scores of times. Yet, in so far as our extensive research has disclosed, never, until the decision of this Court herein, has its burdens been imposed upon any vessel or owner for alleged violation of any rule, requirement or specification of a board of local inspectors or other administrative official. The rule has ever been applied to violations of the statutes or ordinances of a duly constituted legislative body, or rules and regulations formally promulgated by the Board of Supervising Inspectors, pursuant to direct delegation by Congress, which expressly gives to the formal enactments of that Board the force of law. Patently, the promulgations, general or specific, of a local board have not been given the force of law even when they are clearly within the power of the local boards. We submit, therefore, that the decision in this cause constitutes a revolutionary and unprecedented extension of the *Pennsylvania* rule, and that in the rendering of it, this Court has overlooked or failed fully to consider a number of very cogent and significant factors.

The *Pennsylvania* rule has been variously restated, but let us take as reasonably typical this Court's restatement of it in *The Denali*, 112 Fed. (2d) 952, 955:

"The rule and presumption established in The *Pennsylvania* control in libels . . . where the vessel has violated the *positive command* of a safety statute . . ."

Add to that language the words "or rule of the Supervising Inspectors having the force of statute, and we have a good, up-to-date and complete restatement of the *Pennsylvania* rule for any purpose connected with shipping.

Now let us turn to the acts of Congress from which the local inspectors must derive whatever power they have, and see if by any reasonable process of logic we can find warrant for giving their requirements or specifications the force of law.

Section 375, Title 46, United States Code, is the fountainhead section which gives any rule making power to any instrumentality of the Bureau of Marine Inspection and Navigation. It vests that power exclusively and for limited purposes (*i. e.*, to establish *all* necessary regulations to carry out . . . the provisions of this and the following chapter . . .) in the Board of Supervising Inspectors, and provides that *when* these rules are formally adopted, *and* approved by the Secretary of Commerce, they shall have the force of law. In addition to this general delegation, there are a score or more specific delegations of power to make rules, specify materials and equipment, and approve standards, tests and devices, but the delegations are *invariably* to the Board of Supervising Inspectors; or to high officials of the Department of Commerce,—the Secretary or the Director of the Bureau. Exemplary statutes are: Secs. 380, 381, 391, 396, 408, 412, 465, 472, 473, 476, 481, 482 (this is the passenger steamer bulkhead statute), 487, 489, and the more recently adopted sections, 368, 391a, 392, 411, 526c and 526p., which will be found in the U. S. C. A. pocket supplement.

If Congress had intended to delegate to *local inspectors* any rule making power, or the power to prescribe standards and requirements for safety, or to clothe such inspectors' orders and directions with the force and effect of a statute, it would have so provided in its enactments.

On the contrary, it delegated those powers exclusively to the Supervising Board, and required the approval thereof by the Secretary of Commerce before even that Board's enactment attained the force of law. We submit, the whole statutory scheme indicates conclusively that Congress never intended the local inspectors to have any discretion in fixing standards or requirements for any class of vessels, but reserved that power exclusively to itself, except in the instances and to the extent that it has specifically delegated the power to the Supervising Board.

Let us look briefly at the minimum requirements promulgated by the local inspectors on June 3, 1940. They purport on their face to deal with "inspection and certification of non-self-propelled pleasure vessels," and to constitute "*general provisions*, constituting minimum requirements (which) shall be followed in the inspection and certification of such vessels." [A. I. 392.]

That is not inspection. That is pure legislation, or rather, attempted legislation. This promulgation purports to carve out of the general classification of sea-going barges, a special class of sea-going barges, consisting of *all* non-self-propelled vessels anchored at sea which are patronized by the public for pleasure purposes; and, without a scratch of authority from Congress, to impose upon *all* those vessels, regardless of their individual seaworthiness or suitability, general requirements as drastic, if not more drastic, than Congress has ever seen fit to impose upon any class of vessels afloat!

The powers vested in the local inspectors by Congress, with respect to sea-going barges, are found exclusively in Section 395. They are, that at least once each year the local inspectors "shall inspect the hull and equipment of

every sea-going barge . . . and shall satisfy themselves that such barge is of a structure suitable for the service in which she is to be employed; has suitable accommodations for her crew, and is in a condition to warrant the belief that she may be used in navigation with safety to life." The power is to inspect and to satisfy themselves. There is no power, either before or after inspection, to impose general standards or general requirements in excess of those prescribed by Congress or the Supervising Board under Congressional authority. Indeed, they have no power as to any vessel *until* they have made an inspection. Then they have only the power to certify her if she satisfies them, or reject her if she does not.

This Court infers, in the opinion, that the local inspectors have the power and duty to "satisfy themselves" and they alone can say, by general requirement or otherwise, what will satisfy them. It is the implication of the decision that the only limitation upon this power is that its exercise shall not be arbitrary or irrational. If that be so, any board of local inspectors has power to require almost any sort of structure and equipment for any class or group of vessels, and run them off the seas if their owners do not or cannot comply. Let us consider a few possibilities, always within the bounds of reason:

An act of Congress requires not less than *three* cross bulkheads for sea and lake-going passenger steamers of over 100 tons. (Sec. 482.) A board of safety minded local inspectors might decide to require *six* to "satisfy themselves" of the suitability of all such steamers, and forthwith half of the steamers in their district would be unable to obtain certificates. The Rules of the Supervising Inspectors (Rule 63.14; 1942 issue) provide that

in the inspection of hulls, boilers and machinery, the Rules of American Bureau of Shipping shall be taken as standard by local inspectors, except as otherwise by these rules provided. Some local board may claim to be dissatisfied with American Bureau standards and prescribe heavier plates, stronger frames, more bulkheads, and different boilers, and certificates would be denied to every vessel built to American Bureau standards. Magnetic compasses, capable of proper adjustment, are considered as sufficient equipment for most vessels, and neither Congress nor the Supervising Board has ever prohibited their use. A local board might say: gyro compasses are better and safer; we shall not be "satisfied" unless all ships in our district are equipped with gyro compasses.

We might extend the possibilities indefinitely. A local board might even say, without being arbitrary or irrational—we require all ships of our district to be equipped with these new radar devices; then there will be no more fog collisions. The writer hopes to see the day when radar equipment will be required by law on every vessel at sea, but that is not the law yet. Neither is it the law as yet that sailing vessels or sea-going barges carrying passengers have to have water-tight bulkheads.

We earnestly submit that the power, vested in local inspectors by statute, to inspect and satisfy themselves, cannot contemplate anything more than that the local inspectors shall apply existing standards which rest upon statute, upon the rules of the Supervising Inspectors or, in the absence of either, upon the currently accepted standards of seaworthiness in the maritime world and in the locality of the vessel's operations. Those are the standards which bind the courts in determining factual issues

as to seaworthiness, and which certainly must bind ministerial offices such as the local inspectors.

If Congress had seen fit to create a new class of sea-going barges and impose upon them the standards and requirements of passenger carrying steamers, it would have so enacted. If it had intended that the Supervising Board, or a local board should have such power, it would have so enacted. Where it has intended that the Supervising Board should act for it in prescribing standards of safety, it *has* so enacted. But it has never intended and never enacted that any rule or standard making power should rest in the local boards. Any implication of such power to them permits local inspectors to become the final arbiters of the right of any vessel to be on the seas, whether she be sub-standard or super-standard, and to impose upon any class or group of vessels, standards of safety which Congress has deemed neither necessary nor advisable.

There is no judicial authority upon this point, for, apparently, there was never another case where local inspectors have arrogated to themselves the power to create a new class of vessels and establish requirements of safety for it. We have found a few cases which deal with the validity of Supervising Inspectors' rules, and some of them are most interesting, as they deal with the limitations on the rule and standard making power of that board, which is the design of Congress for any delegated power in those respects.

In *Williams v. Molther*, C. C. A. 2, 198 Fed. 460—it was held that the rule making power vested in the Board of Supervising Inspectors by Section 375 was confined to the making of regulations "necessary to carry out the provisions" of designated acts of Congress, and did not

authorize the imposition of conditions upon the granting of a license to a pilot, which were not required by the statute or necessary to accomplish the purpose of the statute. The rule involved required three years of deck experience of the candidate. The trial Court had taken the view that this rule, among others, was necessary and proper to "carry out in the most effective manner" the provisions of law and to "satisfy" the inspectors as to the candidate's qualifications. The Appellate Court reversed; holding that the making of such a regulation was in the power of Congress alone, and while the inspectors might examine and reject an applicant if they found him in fact lacking in adequate deck experience, the Board could not apply an arbitrary rule requiring a particular apprenticeship. The Court said:

"The rule imports into the law a condition not found in it, and we do not think it is necessary to carry out the provisions of the title, or even useful or appropriate for that purpose, as it may prevent citizens entirely competent from obtaining a license. Moreover as we stated in our previous opinion, 'such or similar regulations might easily be used to create a dangerous monopoly in the business of pilots and marine engineers.' " (p. 464.)

That decision is very pertinent to the case at bar, for if we substitute the bulkhead requirements for the Supervising Board's rule, and Section 395 for the licensing statute, we have an exact parallel. Bulkheads as required by the local inspectors are not required by law as a condition to granting a certificate of inspection, and, certainly, local inspectors are without power arbitrarily to impose such requirements *as* a condition.

In *United States v. Miller* (S. D. N. Y.), 26 Fed. 95, —Judge Addison Brown held that the Board of Supervising Inspectors had no power under Section 375 to impose regulations as to lights to be carried by barges, for Congress had undertaken the regulation of lights on vessels, and had vested no power in the Supervising Inspectors to augment its legislation by rule. Said the Court:

“Nothing in that title (R. S. Title 48, dealing with lights) gives any power to the Supervising Inspectors to add to those (statutory) requirements.” (p. 99.)

We submit, nothing in any Congressional legislation gives any power to *local* inspectors to add to the requirements of Congress as to sea-going barges, or any other class of vessels.

In *The Eleanor* (C. C. N. Y.), 8 Fed. Cas. No. 4335, it was held that the Board of Supervising Inspectors had no power, under the acts of Congress, to regulate the navigation of sailing vessels; the power granted to them being expressly related to steam vessels; and therefore their “recommendations” as to the navigation of sailing vessels did not have the force of law, although, when long established and generally adhered to, they might furnish a standard of good seamanship. (p. 426.)

Congress has enacted certain requirements as to sea-going barges. Possibly, from a social point of view, that legislation is sketchy and unsatisfactory. It has also legislated to require cross bulkheads as to certain classes of vessels (passenger steamers; Sec. 482), and *has not* required them in sailing vessels carrying passengers, or in seagoing barges. This also may be inadequate and

unsatisfactory from the social standpoint. But only Congress or its lawful delegate can supply lack in the statutory plan. It is clear that nothing in any statute authorizes any additions to Congressional requirements by any rule, requirement or act of the local inspectors. They are not Congress' delegate.

We doubt if these bulkhead requirements could lawfully be imposed, even by formal promulgation by the Board of Supervising Inspectors and the approval of the Secretary of Commerce, for, Section 375 only gives them the rule making power to make "necessary regulations to *carry out* in the most effective manner the provisions of this and the following chapter." It does not empower them to add new requirements. But we need not consider that question, for these bulkhead requirements were never adopted as a regulation by the Supervising Board or approved by the Secretary. By no stretch of imagination can they be given the force of law.

This Court says of the requirements of the local inspectors as to bulkheads:

"Here was an administrative function of a local matter which Congress had specifically delegated to the local inspectors. They, and nobody else could perform it. Compare *Morgan v. United States*, 298 U. S. 468."

We cannot believe that the Court means that literally, for if it does, the decision holds that Congress has ceded to the forty odd boards of local inspectors, the power, in their several districts, to prescribe what shall be the structure and equipment of any or all vessels, and to deny them the use of the seas if they do not or cannot comply. Such a concept of administrative function is simply be-

yond our comprehension, for it means that any board of local inspectors, by the device of prescribing minimum requirements in excess of those of Congress, may completely thwart the expressed intentions of Congress. Under such powers, and well within the bounds of apparent rationality, venal inspectors might create in their districts an unassailable monopoly for favored ships or operators; or inspectors, super-safety minded, might drive half the ships in their district to the ship brokers.

We suggest that what the Court intended to say was that the *function of inspection*, not the function of prescribing requirements, was the administrative function which had been delegated to the local inspectors and which they alone could perform. With that we fully agree.

As we understand the intent of Congress, it is that vessels shall be inspected and certificated by the local inspectors, who are to apply the standards of seaworthiness of the maritime world, as extended, modified or relaxed by the specific enactments and requirements of Congress, or by the duly enacted and approved rules of the Supervising Inspectors. The local inspectors must first *inspect*. When they have inspected, applying those standards, their function is to certify or reject. If they find a vessel to be up to those standards,—suitable *by those standards* to perform her function,—they must certify her. Failure to do so is an abuse of function. If she is found to be sub-standard, they must reject her, and such failure is a like abuse of function. But if local inspectors say that they are not satisfied with prescribed standards and requirements, and undertake to impose higher standards and additional requirements, then they are ceasing to perform an administrative function, and are assuming a legislative or dictatorial function.

We respectfully insist that local inspectors, in advance of inspecting a ship and ascertaining whether she is suitable by prescribed or recognized standards, cannot impose, either as to a specific ship, or a group or type of ships, requirements in excess of the requirements of law or of generally accepted standards of seaworthiness. To do so is legislation. We further insist that local inspectors cannot, *after* inspection of a specific ship which is standard in hull and equipment, reject that ship, on the sole ground that she lacks some sort of structure or equipment which the law or generally accepted standards do not require of vessels of her type and in her service. To do so is legislation and *discriminatory* legislation.

Suppose the local inspectors, as was their duty, had inspected OLYMPIC on or before the date of the accident. Would they have properly performed their function to "inspect—and satisfy themselves." (Sec. 395. The general inspection section 391 says "carefully inspect and satisfy.") by looking into the hold, and saying "rejected, no bulkheads"? Certainly not, for no law, no regulation and no generally recognized standard of general seaworthiness requires more than the collision bulkhead in non-mechanically propelled vessels. The collision bulkhead was there, and the hull was tight and strong. She was standard by every test of law and every test of practical seaworthiness which the courts have ever recognized. They could not lawfully have rejected her.

This Court has invited a comparison of the case of *Morgan v. United States*, 298 U. S. 468. We see in this case a strong authority for Hermosa, not only upon the point for which this Court cited it (p. 481), but upon our position that inspection by local inspectors must be had in accordance with the standards imposed by law.

On page 479, the Supreme Court said:

“The secretary as the agent of Congress in making the rates must make them in accordance *with the standards and under the limitations which Congress has prescribed*. Congress has required the Secretary to determine, as a condition to his action that the existing rates are or will be ‘unjust, unreasonable or discriminatory.’ *If and when* he so finds, he may ‘determine and prescribe’ . . .”

In our case, the local inspectors are authorized to *inspect*, and then to satisfy themselves (determine) that the vessel's structure is suitable. They must do so under the standards and limitations which Congress has supplied—not upon their own standards. These local inspectors did not inspect OLYMPIC and did not, as a result of inspection, determine whether OLYMPIC's structure would or would not “satisfy them.” They simply promulgated their own standards by fiat.

On the point for which this Court cited the *Morgan* case, it is entirely with Hermosa's position. The Supreme Court held that where Congress had delegated to the Secretary, legislative and judicial functions, he and he alone, could perform it. If Congress has delegated any legislative power to anyone to prescribe additional requirements for sea-going barges, the delegation was made solely to the Supervising Board and the Secretary of Commerce. They, alone, can prescribe such requirements.

It is most earnestly submitted that there is absolutely no warrant or authority in law for the local inspectors to impose their bulkhead requirements upon OLYMPIC, and that the trial Court was absolutely correct in holding that the minimum requirements of June 3, 1940 were a “nullity.”

Point Three.

There are two statements in the opinion of this Court that we are having difficulty in rationalizing. They are those which say, in substance, that because of Hermosa's violation of the *statutory* requirements, it has the burden of the *Pennsylvania* rule to show that the absence of the *required bulkheads* could not have contributed. This seems to us to involve some confusion of concept.

We assume the Court holds that Hermosa violated the statutes requiring sea-going barges to be inspected and be issued a certificate. Her wrongs or faults, then, were that she had not been currently examined by the inspectors and did not have a certificate. There are the only violations of which she could be guilty. But we cannot, from a causal standpoint, even relate those violations to the sinking of OLYMPIC, the death of any person or the loss of any property. Inspected or not; with or without a certificate; OLYMPIC, struck by SAKITO as she was struck, would have gone to the bottom at the same identical moment by the inevitable laws of physics. It must follow that the Court has not held OLYMPIC liable for her statutory violations *per se*.

We realize, of course, that the practical ground upon which the Court sees contributive fault is the actual lack of the bulkheads, and the burden of the *Pennsylvania* rule has been imposed because the local inspectors purported to require such bulkheads and OLYMPIC did not comply. So, the *essential* fault must be that OLYMPIC violated, not the inspection statutes as such, but these local inspectors' requirements.

These requirements, valid or invalid, are not statutory, and Congress has never given to any rule, requirement or

order of *local inspectors* the force or effect of statute. And unless they are given that force and effect, we submit that there is no principle or authority which justifies the imposing of the unusual and drastic burdens of the *Pennsylvania* rule.

The *Pennsylvania* burden is not the usual burden in tort cases, in admiralty or at common law. It is unusual and exceptional. There are scores of faults which will impose civil liability which do not raise it, and as to which causal effect must be proved by the party charging it by a preponderance of evidence. We have in the books many cases where the most outrageous faults in seaman-ship, in the structure of vessels, and in the failure to take the most elementary precautions, where the *Pennsylvania* principle has been ignored or expressly rejected, because no direct statutory fault was involved. Lookout cases are a good example. Nothing is so elementary as the duty to maintain a proper lookout, and the prudential rule, Article 27, contains an express statutory injunction that nothing in the International or Inland Rules shall exonerate any vessel or owner from the consequences of neglect to keep proper lookout. Yet, because there is no statute or statutory rule directly *commanding* the maintenance of a lookout, the *Pennsylvania* burden has always been withheld in lookout cases.

In *The Blue Jacket*, 144 U. S. 371, 390, the Supreme Court refused to apply the burdens of the *Pennsylvania* case to a vessel deficient in lookout, saying:

“The provisions of Article 24 of the Act of Mar. 3, 1855 is that a vessel is not to be exonerated from the consequences of any neglect to keep a proper lookout. It does not say that a vessel shall, because

of not keeping a proper lookout, be visited with the consequences of a collision. If the collision does not result as a consequence of neglecting to keep a proper lookout, the vessel is not thereby made responsible for the consequences of the collision, and the exemption of the tug, necessarily results from the finding *as a fact* that the absence of a proper lookout in no wise contributed to the collision."

Individual views as to what does and does not constitute a seaworthy or "suitable" vessel may differ widely. It is now the consensus of law and maritime thought that steamers over a certain size should have cross bulkheads. That stage of thought has not yet been reached as to non-mechanically propelled vessels. In a few years we may reach it. Sometime during that transitive period a time will come when nautical thought will be equally divided. Let us assume we had reached that stage in 1940, and a board of local inspectors could say with justification that by the ordinary maritime standards, a sailing vessel should have cross bulkheads. Another local board, in the same or an adjacent state, might say with equal justification, that the usual collision bulkhead is all that current standards should require. Conceivably this Court might have to sustain both views as applicable to inspections in the respective districts.

Now let us suppose that OLYMPIC, from Southern California, and an identical vessel from San Francisco had anchored side by side on a fishing bank; that each was without bulkheads, and each had conducted herself exactly as OLYMPIC had conducted herself on the day of this accident. Suppose SAKITO came along, and by identical conduct, ran into and sank the two of them. Suppose iden-

tical litigation had been had in each case. This Court would find itself exonerating the San Francisco vessel and condemning OLYMPIC for identical conduct, simply because the inspectors at Los Angeles and those at San Francisco entertained different views as to whether an anchored fishing barge should have cross bulkheads.

We have presented this hypothetical catastrophe because it seems to us most forcibly to illustrate the wisdom of confining the drastic *Pennsylvania* rule to the cases for which it was designed;—the direct violation of law itself, voiced by a uniformly applicable statute or a uniform rule to which the legislative authority has given the force of statute.

In applying the *Pennsylvania* rule, we submit, a distinction must be preserved between the commands of the law and the commands of ministerial administrators in the execution of it. A Coast Guard cutter, policing the seas, orders a ship into port for some real or fancied statutory fault. The ship's master ignores the command, continues on his course, and later comes into a collision. In ensuing litigation, the application of the *Pennsylvania* rule will depend upon what? Proof that she violated the *law* or proof that she violated the police vessel's order?

The correct answer seems obvious. The law speaks with its own voice. The ministerial or enforcement officer may command by *authority* of the law, but his commands are not the law itself, unless the legislature expressly makes them so.

The *Pennsylvania* rule, after all, is a rule of evidence. The substantive law is that liability follows causal fault, duly proved, and that remains unchanged, whether the *Pennsylvania* burden or the regular burden is applied. A rule of evidence must be of uniform application, and cannot properly be applied as to “A”, and withheld as to “B”, because of the pronouncement of a ministerial officer or functionary.

The most solemn and reiterated adjudications of the highest court will not necessarily invoke the *Pennsylvania* burden as to a proved fault, because the rule applies, not to judicial commands, but to statutory commands. Neither does it apply to ministerial commands.

We most respectfully submit that in holding *Hermosa* to the burden of proof of the *Pennsylvania* rule in connection with these bulkhead requirements, this Court has flown the rule out into the legal stratosphere where neither principle nor authority can bear it up.

We submit that the *Pennsylvania* rule may legitimately be applied only when a vessel or owner has directly violated the positive command of a statute or statutory rule; —a direct “thou shalt” or “thou shalt not” of the legislature or its express delegate, which can be plainly read or clearly implied from a written law, and which violation, when related to the consequences of the accident, can be, of itself, a proximately causal factor. It will be found, we think, that every case which has applied the *Pennsylvania* rule, is strictly within those limitations.

Point Four.

By the holding of two courts, OLYMPIC was blameless for this collision. Her bulkheads or the lack of them did not cause the collision. Seaworthy or unseaworthy, a law breaker or a law keeper, her condition and her conduct had no causal effect. The trial Court and this Court have so held.

When we try to apply the logic of cause and effect to these deaths and the loss of personal effects, we cannot perceive any chain between OLYMPIC's lack of cross bulkheads and these sad consequences. We can, of course, follow the theoretical proposition that if OLYMPIC had had several more bulkheads than she did have, she might have stayed afloat a few minutes longer, and other lives might have been saved. But that is equivalent reasoning to saying that if the OLYMPIC had been the *Queen Mary* she would not have sunk because of her great size, and if she had been the launch *Midget* she would have sunk because of her small size. That is circumstance, not cause.

What, we ask ourselves, was the proximate cause of the OLYMPIC sinking when she did? We can only see one answer:—the collision! That cause fills every inch of the canvas, *Pennsylvania* rule or no *Pennsylvania* rule. OLYMPIC's physical condition, whatever it was, was merely a circumstance in the case, or, as the courts have often said, a "condition" of the losses, not a cause.

Suppose OLYMPIC had been lying at anchor on September 4th, sorely injured in a previous accident. Suppose the previous accident had been caused by her own statutory fault. She is unseaworthy through her own fault, but she is still afloat and will remain afloat until help

comes. Her passengers are all on deck, scared but safe. Now comes SAKITO, under identical circumstances as in the case at bar, smashes into her, and she sinks. Are not SAKITO's faults the proximate cause, and the sole proximate cause of the deaths? Is not OLYMPIC's condition, however brought about, a *condition* of the deaths and not a cause? It seems to us inevitably so.

We cannot distinguish the real OLYMPIC's situation from many cases, some of which were decided by this Court, where a vessel was guilty of statutory violation by being on the wrong side of a channel or anchored in an unlawful anchorage. Another vessel comes along, sees her, appreciates her situation, has the power to avoid her, but fails to do so. The fault in being on the wrong side of the channel or improperly anchored does not have causative effect, and the proximate and sole cause of the collision and its consequences to both vessels is the bad navigation of the other.

This principle is firmly established in the Second Circuit by a considerable line of recent cases, and the propriety of applying the *Pennsylvania* rule has been squarely considered and rejected.

The most recent pronouncement is *Mattoon Oil Corp. v. The Greene*, 129 Fed. (2d) 618, 620, wherein the Court did hold a vessel on the wrong side of a channel contributively at fault under the *Pennsylvania* rule, for her proofs had not shown that her unlawful position did not actually impede the other's navigation. But the Court expressly approved and distinguished its other cases, where a different conclusion had been reached. It said:

“For this statutory fault she must be held responsible unless she proved that it could not have con-

tributed to the collision. *The Pennsylvania; Lie v. San Francisco & Portland S. S. Co.* While recognizing this principle, we have often exonerated vessels out of position when it appeared that ‘the . . . fault was a condition, not a cause of the collision.’” (Citing cases.)

The cases cited are:

The Socony, No. 19, 29 Fed. (2d) 20, 22;

The Clara, 55 Fed. 1021;

The Perseverence, 63 Fed. (2d) 788;

The Syosset, 71 Fed. (2d) 666;

The Bellhaven, 72 Fed. (2d) 206;

Construction Aggregates Co. v. Long Island R. Co., 105 Fed. (2d) 1009.

This Court has reached precisely the same conclusions in the following cases:

American Hawaiian S. S. Co. v. King Cole Co.,
11 Fed. (2d) 41, 43;

The Yucatan, 226 Fed. 437, 439;

The Europe, 190 Fed. 475, 481.

In those cases the Court does not discuss the *Pennsylvania* rule by name, but that it was fully conscious of it is demonstrated in *The Europe*, where it was said:

“A harmless fault, (anchor lights not complying with the statute), even where a positive mandate of a statute has been disobeyed, cannot be made the basis for the recovery in a civil suit, or palliate the fault of another which does inflict the injury.” (Citing and quoting from the *Blue Jacket*, 144 U. S. 371, 390.)

Let it not be thought that we cannot distinguish between factors contributing to a collision and factors contributing

only to a consequent loss, such as these deaths and property losses. We concede that if OLYMPIC had been guilty of some positive fault or negligence toward her patrons or toward the property on board her, after the collision, from which a trier of fact might reasonably find that lives or property were lost, which otherwise would have been saved, we would have an independent and intervening *proximate cause* and even, possibly, a sole cause. But mere passive condition of a vessel, which is incapable in itself of causing harm to her own people, or of influencing or affecting the conduct of the colliding vessel, cannot, we submit, be a factor in liability.

As we have said, the *Pennsylvania* rule is not a rule of ultimate liability, but a rule of evidence fixing the burden of proof. It is applied as tending to establish the proximate cause of an injury. The *sine qua non* or "but for" reasoning which it suggests, must result in conviction, not that the violation could have been a circumstance in the loss, but that it could have been a *cause* of the loss. When the *Pennsylvania* burden has been applied to any factor in any case, we still have the question of *ultimate fact*: Did this violation, or fault or circumstance, *proximately cause or proximately contribute* to this loss? That question is essentially and entirely factual, and its ultimate resolution rests upon the trier of the facts, upon the entire evidence in the case, and his reasoning powers as to cause and effect.

Let us give one more hypothetical case. Assume, arbitrarily, that the *Pennsylvania* rule applied to this situation:

A sidewalk cellar door does not have sufficient strength literally to comply with the requirements of a municipal safety ordinance, but is in fact amply sufficient to sup-

port ordinary traffic. "A" is crossing or standing on the door, and "B" negligently drops a safe on the door which crashes through it and drops "A" to death or serious injury. "A" sues both "B" and "C", the maintainer of the door. The Court decides or instructs a jury that the *Pennsylvania* rule applies to "C". If the finding should be that the sole proximate cause of "A's" injury was "B's" negligence in dropping the safe, would this Court reverse, on the reasoning that a door of statutory strength *might* have resisted the safe long enough for "A" to step off?

Surely not, yet that is precisely what this Court has done in the case at bar. The trial Court in its final decree [A. I. p. 146] found as facts:

"That the collision . . . was due *solely* to the faults of *Sakito Maru* . . . in the respects in said opinion set forth; that neither the said collision, *nor any of the consequences thereof*, was due to any fault, omission or neglect on the part of the *Olympic II* . . . in any of the respects alleged in the answer . . . or cross-libel herein or otherwise."

Apply, if we must, the *Pennsylvania* rule to the OLYMPIC's lack of the required bulkheads, and reach the conclusion that if she had had them she might have stayed afloat a few minutes longer. Still, there remains the essential factual question: Was that lack of bulkheads a circumstance or condition of the accident, or a proximate cause of the deaths and loss of effects?

The trial judge's findings negative the latter, and are supported, we submit, by the facts and by essential logic.

Conclusion.

If a rehearing be granted, we shall ask leave to urge a reconsideration of our motions to dismiss the separate appeals as to the death and personal effects claims, for the reasons stated in the brief accompanying our motion, and also of the application to this novel situation of the major-minor fault rule. We have not presented those matters in detail in this petition because of lack of time, and because the four points herein discussed seem to involve more vitally what we see as the essential flaws in this Court's conclusions. Enough has already been said, we hope, to convince the Court that in the interests of justice a rehearing of this aspect of the case should be granted, and for such a rehearing Hermosa respectfully prays.

Respectfully submitted,

ALFRED T. CLUFF,
HUGH B. ROTCHFORD,
GEORGE H. MOORE,
ALLAN F. BULLARD,

Proctors for Appellee, Hermosa Amusement Corporation, Ltd., Petitioner.

Certificate of Counsel.

I ALFRED T. CLUFF, of Counsel for Petitioner above named, do hereby certify that the foregoing Petition for Rehearing is, in my judgment, well founded and is not interposed for delay.

New York City, N. Y., August 12, 1943.

ALFRED T. CLUFF.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

STERLING CARR, as Trustee in Bankruptcy of
NIPPON YUSEN KABUSHIKI KAISYA, a corpora-
tion, Bankrupt, and FIDELITY AND DEPOSIT
COMPANY OF MARYLAND, a corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD., a cor-
poration, and J. M. ANDERSEN,

Appellees.

(And Fourteen Consolidated Appeals.)

No. 10,190

Jun. 28, 1943

Upon Appeals from the District Court of the United States for the
Southern District of California, Central Division

Before : DENMAN, MATHEWS and STEPHENS, Circuit Judges.

DENMAN, Circuit Judge:

Sterling Carr, as Trustee in Bankruptcy of Nippon Yusen Kabushiki Kaisya, a corporation, Bankrupt, hereinafter called Nippon, and Fidelity and Deposit Company of Maryland, a corporation, appeal from an interlocutory decree in admiralty holding Nippon solely in fault for a collision of its Japanese Motorship Sakito Maru, motoring toward Los Angeles Harbor, with the pleasure fishing barge Olympic II, owned by appellee, Hermosa Amusement Corporation, Ltd., a corporation, hereinafter called Hermosa, the Olympic being anchored at bow and stern while fishing at Horseshoe Kelp in the Pacific Ocean, approximately $3\frac{1}{4}$ nautical miles from the lighthouse on the west breakwater of Los Angeles Harbor, whereby the Olympic became a total loss, several persons on her were drowned and personal effects lost.

A. *The Sakito's liability for the sinking of the Olympic.* The Sakito, crashing into the anchored Olympic, has the burden of

overcoming the presumption that she was at fault and the Olympic not at fault in causing the Olympic's sinking.

In admiralty this presumption does more than merely require the Sakito's going forward and producing some evidence on the presumptive matter, as in civil suits. Cf. *New York Life Insurance Co. v. Gamer*, 303 U. S. 161, 171. It places a "burden of proof" on the moving vessel "to show either that the steam-tug [the moving vessel] was without fault or that the collision was occasioned by the fault of the schooner [the anchored vessel], or that it was the result of inevitable accident." *The Clarita and The Clara*, 23 Wall. 1, 13; *The Oregon*, 158 U. S. 186, 193; *United States v. King Coal Co.*, 5 F. 2d 780, 783 (CCA-9). Here there is no evidence warranting a finding of inevitable accident.

All the crucial witnesses on both sides testified in open court, with the exception of the Sakito's first officer and lookout. Their testimony, given by deposition in advance of the trial, was in the main consistent with the story of the Sakito's master, who was heard by the court.

There is abundant testimony of these witnesses, heard by the trial court, from which that court could infer that Horseshoe Kelp is a customary and proper place for the anchorage of the fishing barge and that in no way did the Olympic cause an obstruction to the proper navigation of vessels approaching or leaving the harbor.

So far as concerns the Sakito's burden of proof of her charge that the Olympic's crew failed to give the proper signals in the existing fog conditions, and that the Olympic was not properly manned, the Olympic's crew's testimony and that of persons on nearby vessels was heard by the trial court and seems to us acceptable for sustaining even a burden of proof on the Olympic of her lack of fault. True, as to the signals, it is opposed in part by the depositions of the Sakito's lookout and mate, but there is nothing in the cold pages before us of *all* these witnesses which places us in a position to attempt to reverse the decision of a court which had the opportunity of appraising the mental capacity, memory and veracity of so many witnesses. *The Ernest H. Meyer*, 84 F. 2d 496, 501 (CCA-9). We sustain that court's decision and hold, not only has the Sakito not maintained her burden of proving fault in the manning of the Olympic or in the conduct of her

crew but, that the latter is shown to be without fault contributing to the collision.

Similar conditions apply to the burden of proof on the Sakito to show she was without fault in her navigation into the Olympic.

There is some dispute as to her speed, but the fact the scars on the Sakito show that she penetrated into the Olympic's iron frame and plates to her midship section for 23 feet of the latter's 38-foot beam, smashing in not only the latter's side plates and between decks but her bottom and keel, to us proves conclusively that the Sakito's navigator did not have the control over her which would enable her to be dead in the water in half the visible distance between her and the anchored Olympic. The Ernest H. Meyer, supra, 497; The Silverpalm, 94 F. 2d 754, 757 (CCA-9); The Catalina, 95 F. 2d 283, 286 (CCA-9). It is possible there is an exception to the rule of these cases where there is a sudden change in visibility such as running into an extraordinary fog density from a much lighter fog area, but no such condition is shown here to aid the Sakito's burden of proof. We hold that the appellants are liable to appellee Hermosa for the total loss of the Olympic.

B. *The liability for the death and personal property loss on the sinking of the Olympic.* The sinking of the Olympic caused the deaths of a number of persons on her, and the loss of certain personal effects. The district court held that Sakito solely at fault for these losses. Nippon contends that Hermosa, if not solely at fault, causatively contributed to these losses.

Sakito's causative relation to the loss of life and personal effects is apparent. The question remaining is whether Hermosa is also at fault, in which event one-half of Nippon's liability to the claimants for loss of life and personal effects must be shared by Hermosa. The Chattahoochee, 173 U. S. 540, 554, 555; Erie R. Co. v. Erie and Western Transportation Co., 204 U. S. 220, 226; Aktslsk. Cuzeo v. Sucarseco, 294 U. S. 394, 401.

The Olympic was an ocean-going barge of over 100 tons. She was navigating the Pacific at the time she was carrying the pleasure fishermen and others at Horseshoe Kelp and hence required to comply with the requirements of the United States local inspectors as to her structure and otherwise. United States v. Monstad, 134 F. 2d 986, 987 (CCA-9). The Los Angeles local

inspectors had required of the Olympic and other pleasure fishing barges operating in the neighborhood of Los Angeles Harbor and within the control of these inspectors, that the annual thousands of fishermen they carry should be protected from just such a collision as occurred here by having the hull of each compartmented by sufficient water-tight transverse bulkheads to keep the vessel afloat if one of the compartments were flooded.)

The specific requirement on the Olympic as a condition for the issuance of the inspectors' certificate¹ permitting her operation was "a sufficient number of transverse watertight bulkheads * * * fitted so that the vessel will remain afloat with positive stability in the event any one main compartment is flooded."

Here was an administrative function of a local matter which Congress had specifically delegated to the local inspectors. They and nobody else could perform it. Cf. *Morgan v. United States*, 298 U. S. 468, 481. We can see nothing arbitrary or irrational in the bulkhead requirement. On the contrary, it seems to us a wise exercise of the inspectors' administrative duty.

146 U. S. C. A. "§ 395. Seagoing barges: certificates. The local inspectors of steamboats shall at least once in ever year inspect the hull and equipment of every seagoing barge of one hundred gross tons or over, and shall satisfy themselves that such barge is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in a condition to warrant the belief that she may be used in navigation with safety to life. They shall then issue a certificate of inspection in the manner and for the purposes prescribed in sections 399 and 400. (May 28, 1908, c. 212, § 10, 35 Stat. 428.)

"§ 396. Equipment of barges with life-saving appliances. Every such barge shall be equipped with the following appliances of kinds approved by the board of supervising inspectors: At least one life-boat, at least one anchor with suitable chain or cable, and at least one life preserver for each person on board. (May 28, 1908, c. 212, § 11, 35 Stat. 428.)

"§ 397. Certificate of inspection and equipment of barge required. A register, enrollment, or license shall not be issued or renewed by any collector or other officer of customs to any such barge unless at the time of issue or renewal such barge has in force the certificate of inspection prescribed by section 395 and on board the equipment prescribed by the preceding section. (May 28, 1908, c. 212, § 12, 35 Stat. 428; Mar. 4, 1915, c. 184, § 6, 38 Stat. 1218.)"

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Hermosa failed to install the bulkheads and ~~the inspectors refused their certificate~~. Instead of withdrawing the Olympic, Hermosa continued in its business of accepting the pleasure fishermen and exposing them to the danger from which the local inspectors' requirements aimed to protect them.

The district court, whose decree preceded our decision in the Monstad case, erred in holding that the Olympic was not under the jurisdiction of the local inspectors and that, even if so, the inspectors had no power to require the bulkheads.

Nippon contends that Hermosa's violation of the requirement of the Congressional statute, occurring at the moment of the drownings and loss of personal effects, places on Hermosa the burden of proving that the absence on the bulkheads not only did not contribute but "*could not have contributed*" to the loss, under the rule of *The Pennsylvania*, 19 Wall. 125, 136; *The Denali*, 112 F. 2d 952 (CCA-9); *Lie v. S. F. & Portland S. S. Co.*, 243 U. S. 291, 298. In this we agree.

Hermosa has not sustained this heavy burden of proof. The Olympic sank in between three and four minutes. Hermosa's expert first testified that

"* * * I believe that, in the first place, if you strike a vessel that hard—I am still going to insist on hitting that is a hard blow, 23 feet—the decks would fall down. That would be the first thing that would happen; and the whole structure of the vessel would collapse and render those bulkheads asunder."

On cross-examination he admitted

"Q. With such water-tight bulkheads, such a barge would remain afloat much longer than it would without them, isn't that correct?

A. That is right what I believe, Mr. Adams."

The Hermosa has not proved that her violation of the statutory requirement could not have contributed and that if the Olympic had the required bulkheads she could not have remained afloat long enough for all the people on board and the personal effects to be safely removed.

and personal injury

Nippon contends that Hermosa's violation of the statutory requirement for the safety of the lives on board makes Hermosa also in fault for the sinking of the Olympic and that there should be a division of damages for her loss. We do not agree. The statutory requirement was for the protection of lives after such an occurrence as a collision, not for the prevention of collisions.

We hold Hermosa liable to Nippon for half the liability of Nippon to the claimants for the loss of life and personal effects. *How much?*

arising from the failure to install proper life lines

It is apparent that the claimants have no interest in the above issues between Nippon and Hermosa. Nippon did not summons the claimants to appear in this court and Hermosa has moved the dismissal of Nippon's appeal because there was no summons of the other claimants for their appearance or severance from the appeal. Obviously, since none of the claimants has any interest in this liability of Hermosa to Nippon, there was no obligation to summons them so far as concerns that issue.

None of the claimants appealed from the district court's decision that Hermosa was not liable to them. Quite likely this is because they were satisfied with the stipulation for the value of the Sakito, given in her release, and did not wish to incur the expense of the appeal. However, since if summoned they would either have been adverse parties to Hermosa or, if severed, no parties at all, Hermosa is not prejudiced by the failure to summons them. The motion to dismiss the appeal is denied.

The interlocutory decree is affirmed in its holding that Nippon is liable in full to Hermosa for the loss of the Olympic. Insofar as it holds that Hermosa is not liable to Nippon for one-half the liability of Nippon for the loss of life ~~and personal effects~~ it is reversed. The cause is remanded for the determination of the amounts of Hermosa's and Nippon's liabilities to each other.

Affirmed in part and reversed in part.

(Endorsed:) Opinion. Filed Jun. 28, 1943. Paul P. O'Brien, Clerk.

no change

No. 10,190

United States
Circuit Court of Appeals
For the Ninth Circuit

STERLING CARR, as Trustee in Bankruptcy
of NIPPON YUSEN KABUSHIKI KAISYA, a
Corporation, Bankrupt, and FIDELITY
AND DEPOSIT COMPANY OF MARYLAND, a
Corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD.,
a Corporation, and J. M. ANDERSEN,

Appellees.

(And Fourteen Consolidated Appeals.)

APPELLANTS' PETITION FOR A REHEARING

LILLICK, GEARY, MCHOSE & ADAMS,
IRA S. LILLICK,
KENT A. SAWYER,
634 South Spring Street,
Los Angeles, California,

*Proctors for Appellants
and Petitioners.*

No. 10,190

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STERLING CARR, as Trustee in Bankruptcy
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APPELLANTS' PETITION FOR A REHEARING

*To the Honorable Curtis D. Wilbur, Presiding Judge, and
to the Associate Judges of the United States Circuit
Court of Appeals for the Ninth Circuit:*

By decision herein filed June 28, 1943, the Court affirmed in part and reversed in part the decree of the District Court. It held appellants, petitioners herein, as we under-

stand it, solely at fault for the loss of the Olympic II, and the Olympic II in mutual fault for loss of life, and personal injuries to third persons and loss of their personal effects and for loss of other personal property of third persons aboard the Olympic II.

We address this petition to the Court primarily for the reason that its decision makes no reference to Article 9 of the International Rules of the Road as applied to a vessel in the situation of the Olympic, and secondarily for the reason that we feel this Court, like the District Court, has given greater weight to the testimony of witnesses who had no occasion to observe the facts about which they testified than to the testimony of witnesses whose attention was engaged by and directed to such occurrences. Thirdly, we feel that the decision of the Court is clearly inconsistent with the principles laid down by the First and Second Circuits in fog cases. Lastly, we believe that the opinion does not clearly exhibit the Court's intention to dispose of the entire matter in controversy.

I.

THE PROVISIONS OF ARTICLE 9(i) OF THE INTERNATIONAL RULES OF THE ROAD

The attention of the Court was directed to this Rule of the Road on pages 25 et seq. of appellants' opening brief and on page 8 of appellants' reply brief. This article provides unequivocally that vessels line-fishing with their lines out shall in fog, etc. "at intervals of not more than one minute make a blast; if steam vessels, with the whistle

or siren, and if sailing vessels, with the foghorn, each blast to be followed by ringing the bell."

It is undisputed that the Olympic II had a foghorn on board and did not use it. The only argument advanced against the applicability of this section to the Olympic II by her counsel was the suggestion that it applied only to a moving vessel. It is doubtless true that trawlers will be moving when they are required to give this signal. It is manifest that drift-net vessels *may not* be moving at such times. The same would be true in the case of dredging for shell fish of various kinds. Vessels "line-fishing with their lines out" might be engaged in trolling or be anchored as was the Olympic II. The statute makes no distinction based upon use of motive power to propel the vessel.

As we noted in our briefs, there is no judicial construction of this statute. Its predecessor (Article 10 of the Regulations of 1885, 23 Stat. 439, repealed (1894) 28 Stat. 82 and re-enacted (1895) 28 Stat. 281) had application only to fishing vessels "when in the sea off the coast of Europe lying north of Cape Finisterre". (See historical note to 33 U.S.C.A. Sec. 79).

The original text of Article 9 (the former Article 10) was so vague and of such uncertain application that it was severely criticized by Sir F. Jeune, President in the case of

The London (1904) 10 Asp. M.L.C. 12, (1904) P. 355,
decree modified to mutual fault (1905) P. 152, C.A.

We quote from the opinion of the learned President:

“Art. 10(g) of the Regulations of 1884 is now in force as art. 9(g) of the Regulations of 1897. The material parts of it are as follows:

‘The following portion of this article applies only to fishing vessels and boats when in the sea off the coast of Europe laying north of Cape Finisterre: (g) In fog, mist, or falling snow, a drift net vessel attached to her nets, and a vessel when trawling, dredging, or fishing, with any kind of drag net, and a vessel employed in line fishing with her lines out, shall at intervals of not more than two minutes make a blast with her foghorn and ring her bell alternately.’”

* * * * *

* * * “In a matter of this kind, and especially in the case of rules which are to affect a class of vessels which are obviously not manned by the same class of men as man vessels of greater size and value, it is of importance that such rules should be as clear as possible; and they should be international rules, so as to bind the vessels of other nations as well as our own; and it is desirable they should extend not only to vessels lying off the coast of Europe, but also to vessels navigating the coast of America, nor should they be limited to fishing vessels and boats when off the coast of Europe lying to the north of Cape Finisterre. I say this in the hope that those in authority will see their way before long to make clear and efficient international rules on this important subject.”

* * * * *

* * * “I am not prepared to say that if the Anson had been whistling regularly every two minutes, and, still more, if she had been ringing her bell, the London

would not have had, at any rate, opportunity of hearing more than she did, with the result that her action would have been different. I do not mean to say that I think the rule which requires a whistle to be sounded and a bell rung alternately is a good rule, because I think that the mixing of two different signals—one being the signal for a vessel under way and the other for a vessel at anchor—is unwise; but that is not material in this case, for all I have to consider is whether, if a vessel does not perform her obligations under that rule, she can say it is immaterial whether she did or not, because nothing could have happened if she had which would have tended to prevent this collision. If the Anson had obeyed this rule I think it might have been the case that the London would have had earlier information of the Anson, and would have been able to act accordingly.”

The hope of the Court that the rules would be clarified and made of application in all waters was realized by the revision adopted in the United States in 1907. However, this revision retained the requirement that both foghorn and bell be used by fishing vessels when fishing in foggy weather regardless of what kind of gear was used and regardless of whether such vessels were or were not under way. At the same time, the interval between signals was reduced from two minutes to one minute.

Should the Court be in doubt that this subdivision of Article 9 applies to an anchored vessel when line-fishing, we respectfully request that it examine the third paragraph of subsection (g) of the same article, which provides that fishing vessels at anchor, if attached to nets or other gear, display, at night, additional lights on the

approach of other vessels. This subdivision clearly recognizes, as does Article 9(i), that fishing vessels, when using nets or other fishing gear while at anchor, are a greater source of danger to approaching vessels than when simply at anchor without gear out. In fog or other conditions of obscuration, sound is the substitute for sight. It was and is the manifest intent of the statute to require a special signal from a fishing vessel when a vessel approaching in a fog has both a hull and other gear to reckon with. Both a signal of the foghorn and a sounding of the bell were required of the *Olympic* II.

The instant decision stands now as an implied precedent that the ordinary anchor bell is all that a vessel in the *Olympic's* situation, with gear extending far beyond her hull, near a harbor entrance, directly athwart the courses of moving vessels, and so manned and equipped as to be incapable of observing other precautions for her own safety and that of her passengers, need sound. Resumption of the trade of these vessels may be expected after the war, and the implied decision of the Court on this important point might well be relied upon by them, with the result that other lives and property may be lost.

We respectfully submit that the *Olympic* produced nothing to show that compliance with Article 9(i) would not have avoided collision or that her violation of this Article could not have contributed to it and to the loss of the *Olympic* herself.

II.

THE TESTIMONY AS TO RINGING OF THE OLYMPIC'S BELL

We respectfully urge that the Court reconsider this point by reviewing the matters set forth in our opening briefs. The witnesses who testified that it was not rung during the critical periods are those whose attention was being exercised to hear it. The man who actually had charge of ringing it *thought* he stopped at some time after he saw the Sakito Maru. All witnesses who said they heard the bell had absolutely no occasion to pay particular attention, as, being on stationary vessels, they had nothing to fear from vessels at anchor. We have no doubt the Olympic's bell was rung during much of the period after 6:30 on the morning of the collision at regular intervals. We do not believe there is any credible testimony that it was being so rung as the Sakito Maru approached the Olympic.

III.

THE DECISION HEREIN CONFLICTS WITH THE DECISIONS
IN THE FIRST AND SECOND CIRCUITS

We respectfully submit that the decision of this Court in relation to navigation in fog conflicts with the decisions of the First and Second Circuits in the following cases:

La Bourgogne (1898) 86 Fed. 475 (C.C.A. 2) affirm-
ing 76 Fed. 868;

The Benjamin A. Van Brunt (1899) 98 Fed. 121
(C.C.A. 1);

The Kennebec (1901) 108 Fed. 300 (C.C.A. 2);

The Kungsholm, 1938 A.M.C. 1334, 1342 (S.D.N.Y.).

In the first above case, the writ of certiorari was denied in 172 U.S. 646. Moreover, as recently as the decision in

United States v. Monstad (1943) 134 Fed.(2d) 986,
988 (C.C.A. 9),

this Court recognized the duty of an anchored vessel to be prepared to take steps to avoid collision in fog.

IV.

THE OPINION OF THE COURT OMITS REFERENCE TO CLAIMS
FOR LOSS OF PERSONAL PROPERTY OTHER THAN PER-
SONAL EFFECTS OR FOR PERSONAL INJURIES CONSE-
QUENT UPON THE LOSS OF THE OLYMPIC II.

The record herein discloses that in addition to loss of life and personal effects claims of third persons for personal injuries and property damage were put forward. The opinion of the Court, we believe, intended that no distinction should be made in respect to these third party claims and that only the claim advanced by the owners of the Olympic II for her loss should be treated as a liability for which the Sakito Maru was alone responsible.

This appears to us clear from the Court's reference to the provisions of 46 U.S.C.A. sec. 395, under which the local inspectors are required to "satisfy themselves that such barge is of a structure suitable for the service in which she is to be employed * * * and is in a condition to warrant the belief that she may be used in navigation with safety to life." Clearly personal injuries consequent upon this collision stand, so far as concerned the consequences for failure to comply with regulations, upon

the same footing as loss of life. Equally clearly, we believe, loss of personal property of third persons entrusted to the care of the barge resulting from the breach of regulations, should be treated no differently than loss of personal effects of death and personal injury claimants. In neither case did Olympic II sustain her burden as defined in the Court's opinion.

We respectfully request that the mandate of the Court, when issued, shall clearly reflect the decision of the Court and its intention to dispose of the entire controversy leaving no point open to possible contention in the District Court. In brief, we request that the opinion be modified to show, or the mandate issue in such manner as to exhibit, that the decision of the Court in respect to the losses to which the Olympic II's owners must contribute is not restricted to claims for loss of life and personal effects but embraces claims for personal injuries and loss of other personal property owned by third persons and carried on board the Olympic II.

Respectfully submitted,

LILLICK, GEARY, McHose & ADAMS,
 IRA S. LILLICK,
 KENT A. SAWYER,
*Proctors for Appellants
 and Petitioners.*

CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for appellants and petitioners in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,

August 19, 1943.

Kent C. Sawyer

*Of Counsel for Appellants
and Petitioners.*

**IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT**

STERLING CARR, as Trustee in Bankruptcy of
NIPPON YUSEN KABUSHIKI KAISYA, a corpora-
tion, Bankrupt, and FIDELITY AND DEPOSIT
COMPANY OF MARYLAND, a corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD., a cor-
poration, and J. M. ANDERSEN,

Appellees.

No. 10,190

Jun. 28, 1943

(And Fourteen Consolidated Appeals.)

Upon Appeals from the District Court of the United States for the
Southern District of California, Central Division

Before : DENMAN, MATHEWS and STEPHENS, Circuit Judges.

DENMAN, Circuit Judge :

Sterling Carr, as Trustee in Bankruptcy of Nippon Yusen Kabushiki Kaisya, a corporation, Bankrupt, hereinafter called Nippon, and Fidelity and Deposit Company of Maryland, a corporation, appeal from an interlocutory decree in admiralty holding Nippon solely in fault for a collision of its Japanese Motorship Sakito Maru, motoring toward Los Angeles Harbor, with the pleasure fishing barge Olympic II, owned by appellee, Hermosa Amusement Corporation, Ltd., a corporation, hereinafter called Hermosa, the Olympic being anchored at bow and stern while fishing at Horseshoe Kelp in the Pacific Ocean, approximately 3¼ nautical miles from the lighthouse on the west breakwater of Los Angeles Harbor, whereby the Olympic became a total loss, several persons on her were drowned and personal effects lost.

A. *The Sakito's liability for the sinking of the Olympic.* The Sakito, crashing into the anchored Olympic, has the burden of

overcoming the presumption that she was at fault and the Olympic not at fault in causing the Olympic's sinking.

In admiralty this presumption does more than merely require the Sakito's going forward and producing some evidence on the presumptive matter, as in civil suits. Cf. *New York Life Insurance Co. v. Gamer*, 303 U. S. 161, 171. It places a "burden of proof" on the moving vessel "to show either that the steam-tug [the moving vessel] was without fault or that the collision was occasioned by the fault of the schooner [the anchored vessel], or that it was the result of inevitable accident." *The Clarita and The Clara*, 23 Wall. 1, 13; *The Oregon*, 158 U. S. 186, 193; *United States v. King Coal Co.*, 5 F. 2d 780, 783 (CCA-9). Here there is no evidence warranting a finding of inevitable accident.

All the crucial witnesses on both sides testified in open court, with the exception of the Sakito's first officer and lookout. Their testimony, given by deposition in advance of the trial, was in the main consistent with the story of the Sakito's master, who was heard by the court.

There is abundant testimony of these witnesses, heard by the trial court, from which that court could infer that Horseshoe Kelp is a customary and proper place for the anchorage of the fishing barge and that in no way did the Olympic cause an obstruction to the proper navigation of vessels approaching or leaving the harbor.

So far as concerns the Sakito's burden of proof of her charge that the Olympic's crew failed to give the proper signals in the existing fog conditions, and that the Olympic was not properly manned, the Olympic's crew's testimony and that of persons on nearby vessels was heard by the trial court and seems to us acceptable for sustaining even a burden of proof on the Olympic of her lack of fault. True, as to the signals, it is opposed in part by the depositions of the Sakito's lookout and mate, but there is nothing in the cold pages before us of *all* these witnesses which places us in a position to attempt to reverse the decision of a court which had the opportunity of appraising the mental capacity, memory and veracity of so many witnesses. *The Ernest H. Meyer*, 84 F. 2d 496, 501 (CCA-9). We sustain that court's decision and hold, not only has the Sakito not maintained her burden of proving fault in the manning of the Olympic or in the conduct of her

crew but, that the latter is shown to be without fault contributing to the collision.

Similar conditions apply to the burden of proof on the Sakito to show she was without fault in her navigation into the Olympic.

There is some dispute as to her speed, but the fact the scars on the Sakito show that she penetrated into the Olympic's iron frame and plates to her midship section for 23 feet of the latter's 38-foot beam, smashing in not only the latter's side plates and between decks but her bottom and keel, to us proves conclusively that the Sakito's navigator did not have the control over her which would enable her to be dead in the water in half the visible distance between her and the anchored Olympic. The Ernest H. Meyer, *supra*, 497; The Silverpalm, 94 F. 2d 754, 757 (CCA-9); The Catalina, 95 F. 2d 283, 286 (CCA-9). It is possible there is an exception to the rule of these cases where there is a sudden change in visibility such as running into an extraordinary fog density from a much lighter fog area, but no such condition is shown here to aid the Sakito's burden of proof. We hold that the appellants are liable to appellee Hermosa for the total loss of the Olympic.

B. *The liability for the death and personal property loss on the sinking of the Olympic.* The sinking of the Olympic caused the deaths of a number of persons on her and the loss of certain personal effects. The district court held that Sakito solely at fault for these losses. Nippon contends that Hermosa, if not solely at fault, causatively contributed to these losses.

Sakito's causative relation to the loss of life and personal effects is apparent. The question remaining is whether Hermosa is also at fault, in which event one-half of Nippon's liability to the claimants for loss of life and personal effects must be shared by Hermosa. The Chattahoochee, 173 U. S. 540, 554, 555; Erie R. Co. v. Erie and Western Transportation Co., 204 U. S. 220, 226; Aktslsk. Cuzco v. Sucarseco, 294 U. S. 394, 401.

The Olympic was an ocean-going barge of over 100 tons. She was navigating the Pacific at the time she was carrying the pleasure fishermen and others at Horseshoe Kelp and hence required to comply with the requirements of the United States local inspectors as to her structure and otherwise. United States v. Monstad, 134 F. 2d 986, 987 (CCA-9). The Los Angeles local

inspectors had required of the Olympic and other pleasure fishing barges operating in the neighborhood of Los Angeles Harbor and within the control of these inspectors, that the annual thousands of fishermen they carry should be protected from just such a collision as occurred here by having the hull of each compartmented by sufficient water-tight transverse bulkheads to keep the vessel afloat if one of the compartments were flooded.

The specific requirement on the Olympic as a condition for the issuance of the inspectors' certificate¹ permitting her operation was "a sufficient number of transverse watertight bulkheads * * * fitted so that the vessel will remain afloat with positive stability in the event any one main compartment is flooded."

Here was an administrative function of a local matter which Congress had specifically delegated to the local inspectors. They and nobody else could perform it. Cf. *Morgan v. United States*, 298 U. S. 468, 481. We can see nothing arbitrary or irrational in the bulkhead requirement. On the contrary, it seems to us a wise exercise of the inspectors' administrative duty.

¹⁴⁶ U. S. C. A. "§ 395. Seagoing barges: certificates. The local inspectors of steamboats shall at least once in ever year inspect the hull and equipment of every seagoing barge of one hundred gross tons or over, and shall satisfy themselves that such barge is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in a condition to warrant the belief that she may be used in navigation with safety to life. They shall then issue a certificate of inspection in the manner and for the purposes prescribed in sections 399 and 400. (May 28, 1908, c. 212, § 10, 35 Stat. 428.)

"§ 396. Equipment of barges with life-saving appliances. Every such barge shall be equipped with the following appliances of kinds approved by the board of supervising inspectors: At least one life-boat, at least one anchor with suitable chain or cable, and at least one life preserver for each person on board. (May 28, 1908, c. 212, § 11, 35 Stat. 428.)

"§ 397. Certificate of inspection and equipment of barge required. A register, enrollment, or license shall not be issued or renewed by any collector or other officer of customs to any such barge unless at the time of issue or renewal such barge has in force the certificate of inspection prescribed by section 395 and on board the equipment prescribed by the preceding section. (May 28, 1908, c. 212, § 12, 35 Stat. 428; Mar. 4, 1915, c. 184, § 6, 38 Stat. 1218.)"

Hermosa failed to install the bulkheads and the inspectors refused their certificate. Instead of withdrawing the Olympic, Hermosa continued in its business of accepting the pleasure fishermen and exposing them to the danger from which the local inspectors' requirements aimed to protect them.

The district court, whose decree preceded our decision in the Monstad case, erred in holding that the Olympic was not under the jurisdiction of the local inspectors and that, even if so, the inspectors had no power to require the bulkheads.

Nippon contends that Hermosa's violation of the requirement of the Congressional statute, occurring at the moment of the drownings and loss of personal effects, places on Hermosa the burden of proving that the absence on the bulkheads not only did not contribute but "*could not have contributed*" to the loss, under the rule of *The Pennsylvania*, 19 Wall. 125, 136; *The Denali*, 112 F. 2d 952 (CCA-9); *Lie v. S. F. & Portland S. S. Co.*, 243 U. S. 291, 298. In this we agree.

Hermosa has not sustained this heavy burden of proof. The Olympic sank in between three and four minutes. Hermosa's expert first testified that

"* * * I believe that, in the first place, if you strike a vessel that hard—I am still going to insist on hitting that is a hard blow, 23 feet—the decks would fall down. That would be the first thing that would happen; and the whole structure of the vessel would collapse and render those bulkheads asunder."

On cross-examination he admitted

"Q. With such water-tight bulkheads, such a barge would remain afloat much longer than it would without them, isn't that correct?

A. That is right what I believe, Mr. Adams."

The Hermosa has not proved that her violation of the statutory requirement could not have contributed and that if the Olympic had the required bulkheads she could not have remained afloat long enough for all the people on board and the personal effects to be safely removed.

Nippon contends that Hermosa's violation of the statutory requirement for the safety of the lives on board makes Hermosa also in fault for the sinking of the Olympic and that there should be a division of damages for her loss. We do not agree. The statutory requirement was for the protection of lives after such an occurrence as a collision, not for the prevention of collisions.

We hold Hermosa liable to Nippon for half the liability of Nippon to the claimants for the loss of life and personal effects.

It is apparent that the claimants have no interest in the above issues between Nippon and Hermosa. Nippon did not summons the claimants to appear in this court and Hermosa has moved the dismissal of Nippon's appeal because there was no summons of the other claimants for their appearance or severance from the appeal. Obviously, since none of the claimants has any interest in this liability of Hermosa to Nippon, there was no obligation to summons them so far as concerns that issue.

None of the claimants appealed from the district court's decision that Hermosa was not liable to them. Quite likely this is because they were satisfied with the stipulation for the value of the Sakito, given in her release, and did not wish to incur the expense of the appeal. However, since if summoned they would either have been adverse parties to Hermosa or, if severed, no parties at all, Hermosa is not prejudiced by the failure to summons them. The motion to dismiss the appeal is denied.

The interlocutory decree is affirmed in its holding that Nippon is liable in full to Hermosa for the loss of the Olympic. Insofar as it holds that Hermosa is not liable to Nippon for one-half the liability of Nippon for the loss of life and personal effects it is reversed. The cause is remanded for the determination of the amounts of Hermosa's and Nippon's liabilities to each other.

Affirmed in part and reversed in part.

(Endorsed:) Opinion. Filed Jun. 28, 1943. Paul P. O'Brien, Clerk.

No. 10,190

United States
Circuit Court of Appeals

For the Ninth Circuit

STERLING CARR, as Trustee in Bankruptcy
of NIPPON YUSEN KABUSHIKI KAISYA, a
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vs.

HERMOSA AMUSEMENT CORPORATION, LTD.,
a Corporation, and J. M. ANDERSEN,

Appellees.

(And Fourteen Consolidated Appeals.)

Appellants' Brief In Reply to Appellees'
Petition for a Rehearing

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**Appellants' Brief In Reply to Appellees'
Petition for a Rehearing**

I.

PRELIMINARY STATEMENT.

Before addressing ourselves to a direct reply to appellees' petition for a rehearing herein we feel it in order to make the following statement as a preliminary thereto:

This case, so far as the decision of this Court has rested liability upon appellees, is one in which antagonistic social and economic interests are involved. There is first the interest of society in preserving and protecting life and property while on the high seas or other navigable waters from undue hazard or risk of loss or injury when consideration is given to such scientific or engineering progress as may be of use or value in their protection or preservation. There is second the economic interest of those who invest capital in shipping enterprises or other business pursuits carried on upon navigable waters.

To the former of these interests—the social interest—it is important that some reasonable consideration be given. To the latter it is equally important that consideration be given else the requirements of safety measures may become so burdensome in the interest of the former that trade and commerce will be strangled.

It is our conception that, in attempting to secure a proper balance and accommodation of these antagonistic interests with flexibility in administration, the Congress, with respect to vessels of the United States, has for well over a half century rested the power to make rules and regulations of national scope and significance in the Board of Supervising Inspectors and of local scope and significance in the control of the Local Inspectors. The latter's control is subject to redress by appeal and probably even to mandamus proceedings if exercised capriciously or in arbitrary manner. (*Williams v. Molther, infra.*) It is probably true that no unsinkable ship can be built. It is inescapable, however, that one vessel of particular design or construction will survive under conditions of wind,

wave, or contact which would result in the loss of another of different design or structure.

The economic motive is to obtain profit through low operating costs. Expenditure of capital is the indispensable concomitant of protection of life and property at sea. So long as a shipowner is able to secure protection through insurance, incorporation, or statutes limiting liability, he will, unless regulated, operate his vessels as cheaply as he can. The laws of the United States have, perhaps in measurable degree in derogation of our economic interests as a commercial nation, long attempted, through express enactment and delegation of rule-making power, to secure safety of life at sea.

In the case before this Court, the rule-making power conferred upon the Local Inspectors by Congress is challenged when that rule-making power was exercised and directed towards the avoidance of the very type of catastrophe which occurred. As such rules were flouted by the Olympic II's owners as she lay afloat, anchored stem and stern in dense fog across the courses of vessels to and from Los Angeles Harbor, it is, after her loss and the loss of life and property occasioned by her non-compliance with such regulations that those losses are sought to be evaded by her counsel's able presentation of nice technicalities of waiver and invalidity.

In the circumstances, and in giving consideration to the weight and merits of the arguments of appellants' petition for rehearing and that of appellees, we respectfully request the Court to consider carefully the consequences of a decision which might lessen, weaken or avoid

the authority of an administrative body of experts to deal promptly and effectively with abuses dangerous to life and property and cast upon the Congress the entire burden of the regulation of such subjects as these, which are of a highly technical and specialized nature.

II.

THIS COURT DID NOT ERR IN REVERSING THE ALLEGED FINDING OF THE DISTRICT COURT THAT THE REQUIREMENTS OF THE INSPECTORS WERE NOT IN FORCE ON SEPTEMBER 4, 1940.

While there is much argument under "Point I" of appellees' petition which is properly related to and more fully developed in subsequent points, we shall here, in the interest of clear presentation, devote ourselves to the main argument presented. As we understand that argument it is simply this: The decision of this Court reversed a fairly implied finding of the District Court that a reasonable time had been given Olympic II to comply with regulations (conceded argumentatively to be valid) and that such time had not expired on September 4, 1940, when the loss of life and property and injury to persons occurred.

It is not disputed that the requirements were made known to the Olympic's owners on June 3, 1940, when the fishing season was in its incipiency. It is not disputed that on July 24, 1940, Commander Field, Director of the Bureau of Navigation in Washington, addressed a letter to Olympic's owners wherein they were advised that the

action of the Local Inspectors in imposing the challenged requirements and the action of the Supervising Inspectors in affirming them was correct. The appeal was denied in express words, the Director of the Bureau stating that he had reviewed the requirements and was “of the opinion that such requirements are reasonable and generally *necessary to adequately ensure the safety and protection of the patronizing public.*”^{*} The letter concludes that the action of the Local and Supervising Inspectors is “hereby sustained.” There is no hint in that letter of any extension of time to Olympic. (Ap. II, pp. 744, 745) As to whether such requirements were intended to be in effect forthwith we call attention to this further passage from the same letter:

“The statutes further provide that until this standard is fully complied with the Local Inspectors are not authorized to issue a certificate of inspection to any such vessels.”

Yet in their brief counsel state that the Olympic still had a reasonable time, and Olympic if inspected on September 4, 1940, “would have satisfied the inspectors and would have passed and received her certificate”. (Pet. p. 5) Patently she would not unless the Local Inspectors or Supervising Inspectors were prepared to override the mandate of the Director of the Bureau in dismissing Olympic’s appeal wherein he stated that “*until this standard is fully complied with the Local Inspectors are not authorized to issue a certificate of inspection to any such vessels*”.

^{*}Emphasis supplied throughout.

If it be assumed that there was any burden upon us to establish that the regulations were in force prior to September 4, 1940, the above evidence amply sustained it.

The evidence relied upon to the contrary is an alleged conversation between Captain Fisher and Captain Andersen of Hermosa. The testimony of Captain Andersen as to this conversation and the scope of any relaxations covered by it is extremely vague. (Ap. I, pp. 402-404) Whether it occurred before or after the denial of Hermosa's appeal and the direct ruling of the Director that no certificates should issue in the absence of compliance, is undisclosed. If before, it would appear to be superseded by the appeal, and if after, a toleration which an inferior government functionary was without authority to indulge. Be all this as it may, we have Captain Fisher's letter stating he had no record or recollection of the matter, and what is more important closely following the accident, as counsel point out on page 11 of their brief, Captain Fisher, Captain Alger and Miss Phillips' report to the Bureau indicated such regulations were in effect when the collision occurred. The only person who it is claimed relaxed any requirements was Captain Fisher. Commander Field's recital that a reasonable time had been allowed for the Olympic to comply is completely belied by his own order that certificates be not issued without compliance. It was obviously not written in contemplation of any litigation, and could serve only to whitewash departmental laxness in complying with the Director's own order of July 24, 1940. (Ap. II, p. 744) We are criticized for not calling the Local Inspectors. There is nothing in the record to indicate the Local Inspectors relaxed their requirements.

The letter accompanying the minimum requirements for the Olympic (Ap. I, pp. 390, 391) was peremptory that if she "was found operating in such service without inspection and certification" the consequences of the law would be visited upon her. If we assume that, as a matter of grace, the Local Inspectors granted a reprieve pending the Olympic's appeal to the Supervising Inspectors and that the latter granted a like reprieve pending appeal to the Director, the fact remains that, so far as departmental action was concerned, any remedy of the Olympic had been fully exhausted on July 24, 1940.

We think it is abundantly clear that Olympic did not sustain the burden of showing that the requirements of June 3, 1940, were not in force on September 4, 1940. If we assume that, in the nature of things, a reasonable time after July 24, 1940, was allowable, it is certainly the fair conclusion from petitioners' own showing that Captains Fisher and Alger, as well as the Department of Justice representative, thought it had expired. (Pet. p. 11) Commissioner Field's recital is evasive and does not state the opposite conclusion. In fact, he concludes with the recommendation that the report of the A Board "be accepted". But giving to Commander Field's letter all the weight which petitioners ascribe to it, the record clearly shows that the vote of those in a better position than he to know whether there was waiver or relaxation was *three to nothing* against him.

In considering in the specific case of the Olympic what was a reasonable time, we believe the Court will also bear in mind the fact that her last certificate had been taken from her over one year before the minimum requirements

were imposed. (Ap. I, pp. 371-374; Ap. II, p. 741) The evidence on these points is almost wholly documentary, and under such circumstances the presumption of correctness of the trial court's determination does not obtain.

We respectfully submit that "Point I" of appellees' petition herein is devoid of merit. It is inconceivable that the reasonable length of time should be co-extensive with the fishing season when the requirements were imposed at its very beginning and were coupled with the express warning that, if the vessel were, after June 3, 1940, "found operating in such service without inspection and certification", she would be "duly reported" for violation of statute.

III.

THE REQUIREMENTS OF THE LOCAL INSPECTORS WERE VALID.

Counsel for petitioners contend that the requirements imposed by the Local Inspectors, approved by the Supervising Inspectors and by the Director of the Bureau were invalid. We believe that this argument rests in a complete misconception of the navigation laws of the United States. Those laws do not place all rule-making power in the hands of the Board of Supervising Inspectors, and do not even make their effectiveness in all cases depend upon approval of the Secretary of Commerce. It is perfectly true that under various sections of the Code the power is so lodged and its exercise so to be approved before it is effective. (46 U.S.C.A., Sec. 375) Under other

statutes, rules prescribed by the Board of Supervising Inspectors need not have the approval of the Secretary of Commerce to become effective.

46 U.S.C.A., Sec. 381.

What rule-making power has been reposed in the Supervising Board and the manner of its execution has, however, absolutely nothing to do with what power is reposed in the Local Inspectors functioning in their proper sphere.

By Congressional enactment, powers are expressly granted to local boards. Thus the judgment of the local board determines what crew is necessary for safe navigation.

46 U.S.C.A., Sec. 222.

Under Section 395 of the same title, Local Inspectors are required to satisfy themselves that vessels subject to inspection are of suitable structure. By its decision herein, this Court gave such statute the same realistic treatment which it received from the Circuit Court of Appeals for the Seventh Circuit in

Leathem-Smith-Putnam Nav. Co. v. National Union Fire Ins. Co. (1938) 96 F.(2d) 923 (C.C.A. 7).

In that case, the Inspectors authorized structural changes designed to convert a gravel carrying vessel into a sand-sucker if made in a particular fashion. The owners did not follow these requirements, though representing that they had done so. The vessel was lost and recovery upon an insurance policy requiring the due diligence of the owners was denied. The findings of the District Judge

are quoted and approved in the Circuit Court of Appeals decision. He found:

“Inasmuch as libelants failed to comply with the regulation, they had the burden of showing that their default did not contribute to the disaster and did not meet the burden.”

In that case, as here, the Local Inspectors and the Bureau were endeavoring to do their job and protect life and property. There fifteen lives were lost because the owners wanted to save money. Here eight were lost because of the same consideration. If this Court should not also deal with such regulations in the same resolute and realistic manner as did the Seventh Circuit, more lives will be lost and more property destroyed in marine disasters.

We submit that realistic construction of Section 395 of Title 46 U.S.C.A. requires that when a vessel is inspected, the Local Inspectors state in concrete terms what is required of her to be certificated. Imagine the state of affairs if the Local Inspectors were to state simply their conclusion that a particular vessel could not be navigated in her proposed trade with safety to life and property, leaving it to the owners to guess what steps they would take to improve the vessel before again submitting her to inspection. That is precisely the sort of administration of law which counsel for the Olympic II appear to contend is proper.

Nor is it any answer to say that Local Inspectors of different ports may prescribe different regulations for vessels of substantially the same character. The San Francisco Local Inspectors might well think that a sister ship of Olympic II could be anchored in Carquinez Straits

and engage in the same trade as the Olympic without the same structure being required of her. We have continuously emphasized the exposed position of the Olympic and the fact that San Pedro Bay is substantially an open roadstead. A breakwater was essential to convert a portion of it into a harbor. Moreover, the very appeals which Olympic herself took in connection with the requirements is ample proof that lack of uniformity may be corrected in any proper case. The danger of arbitrary action is fancied, not real.

The Local Inspectors were not ignorant of Olympic II's structure when they promulgated their minimum requirements. The blueprint of the vessel which was submitted to the inspectors was produced in the trial court by appellees. (Ap. I, p. 351)

Thirty-five years ago this Court itself recognized the binding force of the requirements of a full complement of officers and men as prescribed by the Local Inspectors in

Northern Commercial Co. v. Lindblom (1908) 162
F. 250, 254 (C.C.A. 9).

While that case did not involve a collision, the Court expressly pointed out that the complement of crew should be adequate to all the exigencies of the voyage. See:

Texas Co. v. National Labor Relations Board, (1941)
120 F.(2d) 186, (C.C.A. 9).

Prior to 1908, the power to fix the complement of officers and crew had been lodged in the Supervising Inspectors. After an expression of opinion by the Attorney General (25 Op. Atty. Gen. 56) that the power so lodged could not be delegated to the Local Inspectors, the Con-

gress amended the statute making an express delegation of power direct to the Local Inspectors. Whether the Local Inspectors exercise their power pursuant to Section 222 or pursuant to Section 395, we submit that the requirements imposed by them have the force of law.

In arguing their case, appellees point to no Congressional enactment or Rule or Regulation of the Board of Supervising Inspectors with which the requirements of the Local Inspectors here involved are inconsistent.

We respectfully submit that where a statute, as does Section 395, confers upon a local body the duty of withholding license unless satisfied that a vessel can be safely navigated, the very purpose of the Congress in enacting such statute would be frustrated if such local board must simply state, "You may not have a certificate for your vessel." Simplest logic requires that reasons be stated. When stated, they become statutory requirements subject to review in the manner in which the Olympic reviewed them. Any other view would invite such chaos that commerce would be paralyzed.

We submit that it is abundantly clear that ample statutory authorization to Local Inspectors to impose requirements, not inconsistent with rules of a higher authority, flows from the duty to satisfy themselves that a vessel may be safely navigated. Judicial means exist for abuse of such power in a particular case. (*Williams v. Molther, infra.*) No abuse is shown here. Quite the contrary; the very things the inspectors foresaw came to pass.

We cannot here undertake a comparison of the requirements imposed upon the Olympic II as compared with those imposed upon other vessels. We do, however, feel

that the action of the Local Inspectors, approved as it was by the Supervising Inspectors and by the Director of the Bureau, affords reasonable evidence that counsel's *ex gratia* statement that the requirements are more drastic than for any class of vessels afloat is a gross overstatement. (Br. p. 17) We repeat that while appellees' proctors make many general statements in connection with the inspectors' requirements, they point to no rule, regulation or statute with which such requirements are inconsistent. To say that when a situation is known, imposition of requirements must await formal submission to inspection, and that such requirements are nullities if the owner neglects to conform to his duty to present his vessel, appears to us palpably absurd.

It is not disputed by us that Congress might pass a statute which would be a binding guide upon the local boards. Congress has not done so. Accordingly, all the examples posed on pages 18 and 19 of appellees' petition have no pertinency whatsoever.

The decision in

Williams v. Molther (1912) 198 F. 460, 464 (C.C.A. 2) is put squarely upon the ground that the rule of the inspectors was "a direct contradiction of section 4442" of the Revised Statutes. If there be statutory contradiction of the requirements here imposed, it is not pointed out. The statute there involved required the Local Inspectors to give the examination for pilot's papers to any person claiming to be qualified. Counsel here state:

"Bulkheads are *not required* by law as a condition to granting a certificate of inspection, and certainly

local inspectors are without power arbitrarily to impose such requirements as a condition." (p. 21)

Counsel point to no statute, however, which provides that bulkheads may not be required of vessels by Local or Supervising Inspectors pursuant to powers delegated to them by the Congress. If their main argument be sound, how are the inspectors to satisfy themselves that any vessel can be safely navigated in any designated trade? If the steamboat inspection service is to be rendered impotent, why not abolish it entirely?

We are not here concerned with express statutory limits on Congressional delegation of power as in

United States v. Miller (1886) 26 F. 95, 97
(S.D.N.Y.),

and

The Eleanora (1877) Fed. Cas. No. 4335 (C.C.N.Y.).

We are concerned with a case where the delegation is unrestricted so far as concerns the matters specified in the inspectors' requirements as affirmed on appeal. See:

Belden v. Chase (1893) 153 U.S. 674, 14 S.Ct. 264,
37 L.Ed. 1218, 1227.

And consider

Deslions v. Compagnie Generale Transatlantique
(1907) 210 U.S. 95, 28 S.Ct. 665, 52 L.Ed. 973,
990, 991,

where, in a unanimous decision, Mr. Chief Justice White strongly intimates that powers delegated in respect to life-saving equipment are so abundant as to supersede express Congressional enactment on the subject. He said:

“The argument is that, although all the things just stated be true, yet, as the statute, when closely considered, required a greater capacity of lifeboats and rafts than was exacted by the regulations, the statute, and not the regulations, must be considered in determining the sufficiency of the equipment. But we think this is completely answered by the context of the statute, and especially by Section 4405, which gives to the regulations of the board the effect of law.”

There is absolutely nothing but the unsupported suggestion of counsel's brief to sustain the proposition that the Local Inspectors, the Supervising Inspectors and the Director, in their consideration of the requirements laid down for the Olympic II, did not consider all acts of Congress, all rules and regulations having the force of law and all customary standards for construction of vessels exposed to the marine risks to which the Olympic II was exposed. It is clearly to be presumed that official duty was performed by officials charged with such duty.

IV.

APPELLEES' BRIEF IS INCORRECT IN STATING THAT THE BURDEN OF THE PENNSYLVANIA RULE HAS NEVER BEFORE BEEN IMPOSED UPON A VESSEL FOR BREACH OF REQUIREMENTS IMPOSED BY LOCAL INSPECTORS.

Before developing the matters stated in the foregoing heading, we should point out that appellees' brief is replete with protestations of injury because the so-called Pennsylvania rule was imposed upon the Olympic II by

the decision herein. It is unquestionably true that the language of the opinion imports the applicability of that rule. However, the decision itself is predicated upon a quotation from the opinion expressed by Olympic's own expert that she would have remained afloat longer with proper bulkheads as prescribed. Thus it is patent that it was proved at the trial that the absence of bulkheads *was contributory*. No presumption need have been indulged in these circumstances. Indeed, bearing in mind the opinion of the Local Inspectors, the Supervising Inspectors and Director Field, the Court might as well have rested its decision directly upon the overwhelming evidence of these disinterested experts that the Olympic was unseaworthy for the calling in which she was engaged. That alone would be ample to convict her of equal liability for loss of life, loss of property aboard her and for personal injuries suffered by her passengers. It is entirely clear that unseaworthiness of the character here disclosed might be held sufficient to eliminate any fault of the Sakito Maru in the chain of causation which assumed negligence of that vessel first set in operation. Authorities upon this point were called to the attention of the Court on pages 55 and 56 of our opening brief, and we shall not prolong this memorandum by further reference to them at this point.

Referring now to the main topic of this subdivision of our memorandum, we refer to the decision of the Circuit Court of Appeals for the Second Circuit in

The New York Marine No. 10 (1940) 109 F.(2d) 564, 566 (C.C.A. 2).

This case involved a cause of collision in which limitation of liability was sought. It was pointed out that the charterer was liable in full "if it is held that the absence of a second deckhand was a cause of the accident." Swan, C. J., then observes:

"Since the absence has been found, and the lack is admitted to be a statutory fault, (see 46 U.S.C.A. §§222, 362 and 405) it is presumed that the fault is a contributory cause, and the petitioner must bear the burden of showing that it was not. *The Pennsylvania*, 19 Wall. 125, 136, 22 L. Ed. 148; *The Albert Dumois*, 177 U.S. 240, 254, 20 S.Ct. 595, 44 L. Ed. 751; *Lie v. San Francisco & Portland S.S. Co.*, 243 U.S. 291, 298, 37 S. Ct. 270, 61 L. Ed. 726; *The Annie Faxon*, 9 Cir., 75 F. 312, 319; *McGill v. Michigan S.S. Co.*, 9 Cir., 144 F. 788, 795, *Certiorari denied*, 203 U.S. 593, 27 S. Ct. 782, 51 L. Ed. 332; *The Suffolk*, 2 Cir., 258 F. 219; *The Fulton*, 2 Cir., 54 F.(2d) 467, 469; *The Annie* (D.C.) 261 F. 797, 799."

It will be noted that the Court cites the provisions of Section 222 of Title 46 of the United States Code. That section is one which forbids navigation unless a vessel, subject to the inspection laws, shall have:

"in her service and on board such complement of licensed officers and crew including certificated life-boat men, separately stated, as may in the judgment of the *local inspectors* who inspect the vessel be necessary for her safe navigation."

Thus, the undermanned vessel held at fault in the above case had her complement of crew fixed by the Local Inspectors, and the Circuit Court of Appeals for the Second Circuit cited and applied the rule of *The Pennsylvania*

against her. The *requirements* of the Local Inspectors prescribed pursuant to statute were given the force of *law*.

We do not understand, however, that this Court, in making specific reference to bulkheads alone and in pointing out the testimony of appellees' expert in regard thereto intended to limit its decision to that phase of non-compliance alone. Olympic did not satisfy her burden in respect to any of the requirements of the Local Inspectors set forth in Apostles I, pp. 392-401. By singling out from this group one item in respect to which the proof actually preponderated *against* the Olympic, we do not understand that the Court did more than make one specific reference to a condition which was general on the whole record before it. Thus, subdivision 38 (Ap. I, p. 401) required Olympic to have:

“Minimum crew while vessel is at anchor with persons other than crew on board:

1 licensed master

1 licensed engineer

Sufficient certificated lifeboatmen to adequately launch and man all lifesaving equipment, 65% of which shall be able seamen.”

There were persons on the Olympic other than the crew at the time of this disaster. A number of them lost their lives. But Olympic had no licensed master or engineer aboard. She had one ordinary seaman.

There is express adjudication that the Pennsylvania rule applies when the manning requirements of the *Local* Inspectors are not met. Olympic had no master or en-

gineer, nor did she prove that she had a single certificated lifeboat man on board.

In singling out only the one of the forty-two requirements of the inspectors which this Court expressly mentioned in its opinion, we believe that Olympic's counsel have utterly misconceived the scope of the opinion, and have attempted to particularize this case and the Court's decision to the one example mentioned in its opinion. Counsel give no recognition to the broader aspects and implications of the opinion. They do not even attempt to show that the other forty-one requirements of the inspectors were met or argue that any thereof were beyond the power of the Local Inspectors to impose.

The statement on page 27 of Olympic's petition that: "Olympic, struck by Sakito as she was struck, would have gone to the bottom *at the same identical moment* by the inevitable laws of physics" (Pet. p. 27), is only an example of counsel endeavoring to "expert" their own case. The testimony of Captain Wilver produced by Olympic at the trial which this Court quotes in its opinion establishes that her fault was contributory. Olympic could only have been certificated had she had bulkheads pursuant to lawful requirements imposed upon her. Without bulkheads, she sank almost immediately. The decision in the case of the Material Service, *supra* (Leathem-Smith-Putnam Co. v. National Union Fire Ins. Co.) is clear authority that even a certificate would not have availed the Olympic as an excuse if her structure had not in fact met all requirements. Structure, not certification, is the real test. Certification without structure would have availed the Olympic nothing. Structure, regardless of cer-

tification, would have absolved her unless the Court shall find her guilty of other fault as urged in our petition for a rehearing herein.

We submit that the decision of this Court discloses no error of law of the nature attributed to it under "Point III" of appellees' petition, that the opinion is supported by ample authority and that it is not a departure from the Pennsylvania rule.

V.

THE QUESTION OF LEGAL CAUSE IN DETERMINING RESPONSIBILITY FOR LOSSES TO THIRD PERSONS AND THEIR PROPERTY ON BOARD THE OLYMPIC II.

Arguments that Olympic's defaults were not contributory to the loss are inserted somewhat at random throughout her brief. They are, however, largely concentrated under "Point IV", and we shall make our principal answer to them here.

It appears to us that each argument and illustration overlooks the fundamental fact that Olympic II's owners owed a continuing duty to her patrons to keep her in a seaworthy condition and to conform to the bulkhead, manning and other requirements set for her by the Federal authorities. That duty was not suspended at the moment the approaching Sakito struck the Olympic. It might be non-operative as a legal cause if the Sakito Maru would certainly have sunk the Olympic II in precisely the same length of time. Then we might have a case of true intervening cause. But even Olympic's own expert thought bulkheading would have kept the Olympic afloat longer.

How long he did not say. This Court did not resolve that testimony against the Olympic II, but in her favor. It might well have decided that proper construction and manning would have permitted Olympic and all of her passengers and crew to have escaped injury other than that inflicted by the impinging force of the stem of the Sakito Maru into her port side.

Had the Court so determined the matter, and we believe there was ample evidence in the record so to do, the limit of Sakito's liability would have been the amount it would have cost to fit new plates into the side of the barge. All other losses, whether to the owners of the Olympic, to her patrons, to her crew, or to persons having property aboard her would have been for the sole account of Olympic II.

When it was established, as the Court's opinion herein shows, that the Olympic II breached at the very moment of collision a continuing duty she owed to her patrons, crew and property carried on her, which breach proximately contributed to the losses they suffered, we are at a complete loss to see how counsel's arguments that the faults of the Olympic were a *condition* and not a *cause* of disaster has any validity whatsoever.

Whatever may be the rule at common law as to a tortfeasor being required to take his victim as he finds him and make restitution accordingly, that rule could extend even at common law only to the Olympic, not to her patrons. There is very strong authority that the common law rule has no application in admiralty at all. If it has not, Olympic should be made to pay all damages, exclusive of her own loss, and such loss should be equally

divided. This was the rule applied by the Fifth Circuit Court of Appeals in the Agnella-Jordan collision at the outer station off Mobile bar.

Walaas v. Johnson (1913) 204 F. 440 (C.C.A. 5).

The Jordan was an old pilot boat built in 1883 (six years later than the Olympic II, and sunk some 30 years earlier) when struck by the Agnella. The Court allowed her half damages, stating:

“In the case of *The Young America*, Judge Brown, of the Southern District of New York, held that, where the evidence showed that the damages were as much due to defects in the injured vessel as to the negligence of the other, the damages should be equally divided. *The Young America* (D.C.) 54 Fed. 410. It was held in *The Atlanta* (D.C.) 34 Fed. 918, that where the injured vessel was old and weak, and consequently damaged more than a boat in ordinary condition would have been, she should be entitled to recover only half damages.”

* * * * *

“It is not just that the owners of this old boat should continue her in service with her concealed infirmities until an accident compels repairs or rebuilding, and then recover as for a total loss at the expense of others. *The Howard* (D.C.) 30 Fed. 280; *The Quaker City* (D.C.) 19 Fed. 141.”

In

The John R. Penrose (1898) 86 F. 696 (E.D. Pa.), the commissioner had allowed full damages against the colliding vessel for replacement of an unseaworthy bowsprit on the other. Judge Butler stated:

“The vessel was unseaworthy in this respect, and should not have gone out until repaired. * * * She was in fault therefore in going out in such condition. * * * Under the circumstances, I will treat both parties as in fault to this extent, and will allow the libelant one-half the costs, * * *.”

Similarly, we note the fragmentary report of Judge Knight's decision in

The Viking (W.D.N.Y.) 1932 A.M.C. 1159.

Viking was old and her beams and strakes were corroded. The Court said in part:

“It seems to me that it is in line with many authorities under comparable situations, and fair to libelant and respondents, that libelant should have damages only to the extent of one-half of the cost of these repairs as against the tug *Nat Sutton*.”

Accord:

The Smedley (1914) 216 F. 926 (S.D.N.Y.) (Hazel, D. J.);

The Syracuse (1883) 18 F. 828 (S.D.N.Y.) (Brown, D. J.).

We submit that each of the foregoing authorities demonstrates that Olympic II's unseaworthiness and breach of requirements were not mere conditions, but proximate causes of the losses sustained by her passengers to whom she owed the duty to maintain herself in staunch and seaworthy condition and to obey all requirements of the regulations for safety of everything on board entrusted to her care. Indeed, we think this Court might well have applied like principle to the loss of the Olympic II herself.

VI.

CONCLUSION.

In concluding this memorandum, we wish again to call to the attention of the Court the fact that the opinion herein mentions only claims for loss of life and personal effects. We accordingly repeat the request made in our petition for rehearing that, should a rehearing be denied, the opinion or mandate be made to exhibit the clear intention of the Court that personal injuries claimed by those on board the Olympic and claims of third persons for loss of personal property on board the Olympic, other than personal effects, are within the ambit of claims subject to a division of damages as between Sakito and Olympic.

We respectfully submit that the petition of appellees herein for a rehearing of this cause is devoid of merit and should, therefore, be denied.

Respectfully submitted,

IRA S. LILLICK,
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LILLICK, GEARY, McHose & ADAMS,
Proctors for Appellants.

September 1, 1943.

United States
Circuit Court of Appeals
For the Ninth Circuit. 9

AMERICAN SURETY COMPANY, a Corpora-
tion,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
District of Montana

FILED

OCT - 5 1942

PAUL P. O'BRIEN,
CLERK

No. 10229

United States
Circuit Court of Appeals
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AMERICAN SURETY COMPANY, a Corpora-
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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Be It Remembered, that on August 5, 1940, a Complaint was duly filed herein, in the words and figures following, towit: [2]

In the District Court of the United States

District of Montana

Great Falls Division

No. 203

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN V. GROGAN, and AMERICAN SURETY
COMPANY, a corporation,

Defendants.

COMPLAINT

Comes now the plaintiff and for cause of action against the defendants complains and alleges as follows:

I.

That the United States of America is the party plaintiff herein and brings this action on its own behalf, and this court has jurisdiction hereof by reason of the provisions of Section 41, Title 28, United States Codes.

II.

That at all of the times herein mentioned the American Surety Company, a corporation, was, is and continues to be a corporation duly organized

and existing under the laws of the State of New York and authorized to become a surety for hire.

III.

That on or about the 24th day of June, 1931, the plaintiff, being desirous of erecting certain buildings at the United States Inspection Station at Babb-Piegan, Glacier County, within the State and District of Montana, entered into a certain contract in writing with the defendant John V. Grogan, a full, true and correct copy of which said contract, save and except the specifications for construction and the maps and drawings thereto, which were made a part of the said contract, and save and except the directions for [3] the preparation of the Contract, is hereto attached, marked Exhibit "A", and hereof made a part.

IV.

That on or about the 29th day of June, 1931, the defendant John V. Grogan, as principal, and the defendant American Surety Company, a corporation, as surety, for the purpose of complying with the regulations of the plaintiff, and insuring the due performance of the said contract, Exhibit "A", made, executed and delivered to the plaintiff a bond in the penal sum of \$25,000.00, a full, true and correct copy of the said bond, except for the instructions for executing the same, is hereto attached, marked Exhibit "B", and hereof made a part. That the said defendant American

Surety Company, a corporation, was a surety for hire on said bond.

V.

That a notice to proceed as required by said contract was given to the defendant John V. Grogan, by the plaintiff, on the 8th day of July, 1931, and thereupon the said defendant John V. Grogan commenced his performance of said contract.

VI.

That after the 8th day of July, 1931, but prior to the date fixed in said contract as the date for the completion of the said work, and while the contract was in full force and effect, it became necessary that certain changes be made in the work to be done, and that certain extra work be done and materials furnished of the reasonable value of \$3,921.00, and which would increase the amount due under the said contract from \$49,970.00 to \$53,891.00, and as provided in the said contract such extra work to be done and materials to be furnished was ordered and the price fixed and the said John V. Grogan did agree to do such extra work and furnish such materials and to perform the said contract including the doing of the said extra work and the furnishing of said extra materials for the total sum or price payable to him of \$53,891.00. [4]

VII.

That although it was provided in the said contract that the work was to be completed within 240 calendar days after the date of receipt of notice

to proceed, for various causes considered excusable under Article 9 of said contract, the said defendant John V. Grogan was delayed 473 calendar days in the performance of said contract and at his request, and with the consent of the plaintiff, and of the defendant American Surety Company, a corporation, the time for the completion of the work under the said contract was extended to June 20, 1933.

VIII.

That on June 20, 1933, the said defendant John V. Grogan had not completed the work that he agreed to perform under said contract and said work had not been entirely done and the said John V. Grogan had not performed his said contract as he had promised and agreed to do by completing the said work and all thereof agreed by him to be completed on the 20th day of June, 1933; and the said defendant John V. Grogan had not on July 20, 1934, completed all of the work that he promised and agreed to complete under his said contract and a part thereof was uncompleted, and said defendant John V. Grogan on said last mentioned date being in default in the performance of his said contract and having breached the same by not then on that date having completed all of the work that he promised and agreed to complete and to do under his said contract, the plaintiff, acting under the authority given to it in the said contract and in accordance with the terms thereof, on the said 20th day of July, 1934, notified the

said defendant John V. Grogan in writing that his right to proceed under the said contract was terminated on said date. [5]

IX.

That because of the wrongful refusal of the said defendant John V. Grogan to complete his said contract and perform the same and do all of the work he promised and agreed to do in said contract, it became necessary for the plaintiff to complete and cause the said work to be completed, and that in doing the same and completing the said work, the plaintiff expended in the completion of the same the sum of \$3,781.00, which said sum was and is the reasonable value of completing the said work that the said defendant John V. Grogan promised and agreed to do and complete; that because of the wrongful failure and neglect of the said defendant John V. Grogan to complete his said contract and fulfill the terms thereof and do the work he had promised and agreed to do, it became necessary for the plaintiff to employ a construction engineer from the 21st day of June, 1933, to the 30th day of June, 1934, both dates inclusive, and that the plaintiff was required to and did pay to said construction engineer for his services performed during said period of time, the said sum of \$2,288.62; that in addition the plaintiff was required by reason of the default and failure of the said defendant John V. Grogan as aforesaid to complete his said contract as afore-

said to cause inspections to be made on the said work done and performed by the defendant John V. Grogan on January 10, July 27, October 19, November 8 and December 7, 1934, and that the plaintiff, in so doing, necessarily laid out and expended for traveling expenses of engineers and their salaries, while engaged in said inspections, and their transportation, the sum of \$414.00.

X.

That up to the 20th day of June, 1933, the plaintiff had paid to the said defendant John V. Grogan, for the work performed by him under the said contract, the sum of \$49,602.50; [6] that by reason of the wrongful failure and refusal of the said defendant John V. Grogan to perform his said contract and to complete the work that he had promised and agreed to complete, the plaintiff was required to and did lay out and expend the sum of \$6,483.62 in completing the said work that the said defendant John V. Grogan had promised and agreed to do and perform and complete, making a total cost to the plaintiff of \$56,086.12; that had the said defendant John V. Grogan performed the said contract and completed the said work as he promised and agreed to do, the plaintiff would have been required to pay therefor only the sum of \$53,891.00, and that by reason of the wrongful failure, refusal and neglect of the said John V. Grogan to perform his said contract and complete the work that he promised and agreed to complete, the plaintiff has been damaged in the sum of \$2,195.12.

XI.

That paragraph 5 of the specifications which are attached to and made a part of the said contract, provided:

“5. Liquidated Damages.—The contractor shall pay to the government the amount of Twenty Five Dollars (\$25.00) as fixed, agreed, and liquidated damages for each calendar day’s delay in the completion of the contract.”

That said defendant John V. Grogan delayed his completion of the said contract for the period of 395 calendar days and thereby the plaintiff is and was damaged in the amount or sum of \$9,875.00, in addition to the damages hereinabove set out.

XII.

That prior to the commencement of this action and on or about the 1st day of November, 1937, the plaintiff demanded of and from the defendants John V. Grogan and American Surety Company, a corporation, that they pay to it the sum of \$12,070.12, the amount of damage sustained by the plaintiff by reason of the failure and default of the said defendant John V. Grogan in his [7] refusal to perform his said contract as aforesaid, but that the said defendants, and each of them, failed, refused and neglected to pay the said sum of \$12,070.12, or any part or portion thereof and there is now due, owing and wholly unpaid from the defendants to the plaintiff the said sum of \$12,070.12, together with interest thereon at the

rate of 6% per annum from the 1st day of November, 1937.

XIII.

That the plaintiff duly performed all of the conditions precedent on its part to be performed under said contract.

Wherefore, plaintiff prays damages against the said defendants and each of them for the sum of \$12,070.12, together with interest thereon at the rate of 6% per annum from the 1st day of November, 1937, together with the plaintiff's costs and expenses necessarily incurred and disbursed in this action.

R. LEWIS BROWN,

Assistant Attorney of the
United States, in and for
the District of Montana.

Attorney for Plaintiff.

[8]

EXHIBIT A

CONTRACT FOR CONSTRUCTION

This Contract, entered into this 24th day of June, 1931, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and John V. Grogan, of the city of Junction City, in the State of Kansas, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

Exhibit A (Continued)

Article 1. Statement of work.—The contractor shall furnish all labor and materials, and perform all work required for construction of the Main Station Building, as indicated on drawing No. 1, including Collecting Tank and Pump House indicated on drawing No. 4-1, at the United States Inspection Station, Babb-Piegan, Montana, for the consideration of forty nine thousand nine hundred seventy dollars (\$49,970.00), in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specification for the construction of the United States Inspection Station buildings at Babb-Piegan, Montana, with addenda therein, dated May 16, 1931, and drawings Nos. 1, 2, 3, 4, 100, 101, 200, 201, 202, 202A, 2-1, 2-2, 2-100, 3-1, 4-1, PHL-450, PHL-451, PHL-452, PHL-453, Miscellaneous 304E, 305G, Miscellaneous Lighting Fixtures 326B (said drawings being on file in the Office of the Supervising Architect, Treasury Department.

The work shall be commenced as soon as practicable after the date of receipt of notice to proceed, and shall be completed within two hundred forty (240) callendar days after the date of receipt of notice to proceed.

Article 2. Specifications and drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like ef-

Exhibit A (Continued)

fect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

Article 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, and equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment, the dispute

Exhibit A (Continued)

shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called [9] immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and may increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

Article 5. Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article 6. Inspection.—(a) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any

Exhibit A (Continued)

and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

(b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the ex-

Exhibit A (Continued)

penses of such examination, and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 per cent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures, from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site. [10]

Article 7. Materials and workmanship.—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifica-

Exhibit A (Continued)

tions as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates installing, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employees as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

Article 8. Superintendence by contractor.—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

Article 9. Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Ar-

Exhibit A (Continued)

ticle 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof; Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God,

Exhibit A (Continued)

or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto. [11]

Article 10. Permits and care of work.—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

Article 11. Eight-hour Law—Convict labor.—
(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at

Exhibit A (Continued)

the site thereof. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of the act of June 19, 1912 (37 Stat. 137), relating to hours of labor.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article 12. Covenant against contingent fees.—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 13. Other contracts.—The Government may award other contracts for additional work, and the contractor shall fully co-operate with such other contractors and carefully fit his own work to that

Exhibit A (Continued)

provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

Article 14. Officials not to benefit.—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Article 16. Payments to contractors.—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on [12] the site and preparatory work done may be taken into consideration.

Exhibit A (Continued)

(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptance of all work covered by the contract: Provided, however, That the contracting officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: And provided further, That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sold property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than

Exhibit A (Continued)

such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

Article 17. Additional security.—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interest of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Article 18. Definitions.—(a) The term “head of department” as used herein shall mean the head of the executive department or independent establishment involved, and “his representative” means any person authorized to act for him.

(b) The term “contracting officer” as used herein shall include his duly appointed successor or his duly authorized representative.

Article 19. Alterations.—The following changes were made in this contract before it was signed by the parties hereto:

The erasure of the words “other than the contracting officer” in paragraph a, Article 18, and the addition of page 2-A relative to the “Rate of Wage” to be paid by the contractor, to which contractor consented in his telegram dated June 20, 1931.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

Exhibit A (Continued)

We hereby certify that this contract and bond
have been correctly prepared. [13]

THE UNITED STATES OF
AMERICA,

By PERRY K. HEATH,

Assistant Secretary of the
Treasury,

(Official Title)

JOHN V. GROGAN,

Contractor.

Junction City, Kan.

(Business Address)

H. S. ROOME,

Chief, Law & Records Divi-
sion.

H. S. ROOME.

G. R. ROBERTS,

Actg. Supt., Architectural
Engrg.

C. R. ROBERTS.

Two witnesses:

W. F. STEWART,

Junct. City, Kan.

W. A. ROBERTS.

I,, certify that I am the
..... Secretary of the corporation
named as contractor herein; that.....
who signed the contract on behalf of the contractor,
was then of said corporation;
that said contract was duly signed for and in behalf

Exhibit A (Continued)

of said corporation by authority of its governing body, and within the scope of its corporate powers.

.....

(Corporate Seal)

—————

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, who signed this contract for the had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

.....

Contracting Officer.

This contract is authorized by the acts of May 29, 1928, V. 45, p. 919; December 20, 1928, V. 46, p. 120; March 26, 1930, V. 46, p. 120; May 13, 1930, V. 46, p. 276; May 15, 1930, V. 46, p. 349. [14]

Rate of Wage—The following paragraph pertaining to the Rate of Wage shall apply to every contract in excess of five thousand dollars (\$5,000) in amount:

The rate of wage for all laborers and mechanics employed by the contractor, or any sub-contractor, on the public building covered by this contract shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village or other civil division of the state in which the public building is located. In case any dispute arises as to what are the prevailing rates of wages

Exhibit A (Continued)

for work of a similar nature applicable to the contract which cannot be adjusted by the contracting officer, the matter shall be referred to the Secretary of Labor for determination and his decision thereon shall be conclusive on all parties to the contract, as provided in the Act of March 3, 1931 (Public No. 798). [15]

EXHIBIT "B"

Standard Form No. 25

Approved by the President

Nov. 19, 1926

STANDARD GOVERNMENT FORM OF
PERFORMANCE BOND

(Construction or Supply)

Know All Men By These Presents, That we, John V. Grogan, of Junction City, Kansas, (See Instructions 4, 5 and 7) as Principal, and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, whose principal office is located at 100 Broadway, New York City, New York, as Surety, (See Instructions 2, 3, 4 and 7)

are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of Twenty-five Thousand dollars lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated June 24th, 1931, for construction of the Main Station Building, as indicated on drawing No. 1, including Collecting Tank and Pump House, indicated on drawing No. 4-1, at the United States Inspection Station, Babb-Piegan, Montana.

Now Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the Act of August 13, 1894, as amended by act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract, and any such authorized extension or modification thereof, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties

have executed this instrument under their several seals this 29 day of June, [16] 1931, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[Seal]

JOHN V. GROGAN,

Junction City, Kan.

In presence of—

M. F. STEWART,

Junction City, Kansas.

(Address)

Attest:

AMERICAN SURETY

COMPANY OF NEW YORK,

(Corporate Surety)

320 Patterson Bldg.

Denver, Colorado.

(Business Address)

(Affix corporate seal)

By J. C. SMITH,

J. C. SMITH

Resident Vice President.

A. QUINN

A. QUINN, Resident

Assistant

Secretary

The rate of premium on this bond is 15 per thousand, based on contract price.

Total amount of premium charged, \$749.55.

(The above must be filled in by corporate surety.)

[Endorsed]: Filed Aug. 5, 1940. [17]

Thereafter, on October 8, 1940, a Motion to Strike, and Notice thereof, were duly filed herein, as follows, towit: [18]

[Title of District Court and Cause.]

MOTION TO STRIKE PORTION OF
PLAINTIFF'S COMPLAINT

Comes now the Defendant, American Surety Company, a corporation, by and through the undersigned its attorneys, for itself and not for the remaining Defendant, and moves the court as follows, to-wit:

1. To strike from Plaintiff's complaint all of paragraph XI because the same is (a) redundant matter, and (b) immaterial matter.

Dated this 7th day of October, 1940.

STERLING M. WOOD,
ROBERT E. COOKE,
FREDRIC MOULTON,

By STERLING M. WOOD,

Attorneys for Defendant,
American Surety Company,
a corporation.

Address: Billings, Montana.

[Endorsed]: Filed Oct. 8, 1940. [19]

[Title of District Court and Cause.]

NOTICE OF MOTION

To R. Lewis Brown, Esquire, Assistant Attorney of the United States in and for the District of Montana, Attorney for Plaintiff, and to the Said Plaintiff:—

Please take notice that upon the complaint herein the motion of the above-named Defendant, American Surety Company, a corporation, to strike certain portions of the Plaintiff's complaint will be presented for hearing and determination in the above-named court before the Honorable Charles N. Pray, Judge thereof, at the courtroom in the Postoffice Building in the City of Billings, County of Yellowstone, State of Montana, at the opening day of the next term of the said court at Billings, Montana, or as soon thereafter as counsel can be heard.

Dated this 7th day of October, 1940.

STERLING M. WOOD,

ROBERT E. COOKE,

FREDRIC MOULTON,

By STERLING M. WOOD,

Attorneys for Defendant,
American Surety Company,
a corporation.

Address: Billings, Montana.

[Endorsed]: Filed Oct. 8, 1940. [20]

Thereafter, on July 22, 1941, an Order denying Motion to Strike, was duly entered herein, the minute entry thereof being in the words and figures following, towit: [21]

[Title of District Court and Cause.]

This cause having heretofore been submitted to the Court, on Motion of American Surety Co., to strike from complaint, came on regularly for decision this day, whereupon the court filed its written decision thereon and ordered said motion denied.

Dated July 22, 1941.

C. R. GARLOW,
Clerk. [22]

Thereafter, on September 17, 1941, Answer was duly filed herein, as follows, towit: [23]

[Title of District Court and Cause.]

ANSWER

Comes now the Defendant, American Surety Company, a corporation, in the above-entitled action, whose true name is American Surety Company of New York, by and through the undersigned its attorneys, for itself alone and not for the remaining defendant, and for answer to Plaintiff's complaint admits, denies and alleges as follows, towit:

I.

Admits the allegations of paragraphs I, II, III and IV of Plaintiff's complaint, but alleges that this answering Defendant's true name is American Surety Company of New York;

II.

That this answering Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph V of Plaintiff's complaint;

III.

Admits the allegations of paragraph VI of Plaintiff's complaint;

IV.

Admits as alleged in paragraph VII of Plaintiff's complaint that under the contract provisions the work was to be completed within 240 calendar days after the date of receipt of notice to proceed; admits further that for various causes excusable under Article 9 of the said contract the defendant, John V. Grogan, was delayed, and that the time for the completion of the work under the said contract was [24] extended with the consent of the Plaintiff and of this answering Defendant, but denies each, all and every of the remaining, other and further allegations of paragraph VII of Plaintiff's complaint;

V.

Admits as alleged in paragraph VIII of Plaintiff's complaint that on June 20th, 1933, the De-

fendant, John V. Grogan, had not completed the work agreed to be performed under the said contract; admits further that the said John V. Grogan had not on July 20th, 1934, completed all of the work under the said contract; admits also as alleged in paragraph VIII of Plaintiff's complaint that the Plaintiff acting under the said contract and on the 20th day of July, 1934, notified the Defendant, John V. Grogan, in writing that his right to proceed under the said contract was terminated, but denies each, all and every of the remaining, other and further allegations of paragraph VIII of Plaintiff's complaint;

VI.

Denies the allegations of paragraphs IX and X of Plaintiff's complaint;

VII.

Admits as alleged in paragraph XI of Plaintiff's complaint that paragraph 5 of the specifications attached to and made a part of the contract therein mentioned provides in part that the contractor shall pay to the government the amount of \$25.00 as fixed, agreed and liquidated damages for each calendar day's delay in the completion of the contract, but denies each, all and every of the remaining, other and further allegations of paragraph XI of Plaintiff's complaint;

VIII.

Admits as alleged in paragraph XII of Plaintiff's complaint that prior to the commencement of this action and on or about the 1st day of November, 1937, Plaintiff demanded of and from this answering Defendant payment of the sum of \$12,-070.12; admits [25] further that this answering Defendant has refused to pay the said sum, but denies each, all and every of the remaining, other and further allegations of paragraph XII of Plaintiff's complaint;

IX.

That this answering Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph XIII of Plaintiff's complaint.

And further answering Plaintiff's complaint and by way of defense thereto, this answering Defendant alleges:

1.

That on or about the 17th day of October, 1933, the said Defendant, John V. Grogan, had substantially completed and performed the contract mentioned in Plaintiff's complaint, leaving only an unsubstantial part of the said contract then unperformed.

Wherefore, having fully answered Plaintiff's complaint this answering Defendant prays that the said Plaintiff recover nothing thereunder and that the

said answering Defendant recover its costs of suit herein incurred.

STERLING M. WOOD,
ROBERT E. COOKE,
By STERLING M. WOOD,

Attorneys for Answering Defendant,
American Surety Company of N. Y.

Address: 219-223 Securities
Bldg., Billings, Montana.

[Endorsed]: Filed Sept. 17, 1941. [26]

Thereafter, on December 5, 1941, Original Transcript of Evidence was duly filed herein, being in the words and figures following, towit: [27]

[Title of District Court and Cause.]

ORIGINAL TRANSCRIPT OF EVIDENCE

Appearances:

For United States

R. LEWIS BROWN, Esq.,

D. W. MURRAY, Esq.

For Defendants

MESSRS. WOOD & COOK. [28]

Be It Remembered, That this matter came on regularly for hearing at Great Falls, Montana, on

Saturday, November 29, 1940, before the Honorable Charles N. Pray, Judge Presiding, sitting without a jury.

Whereupon The following proceedings were had and done: [29]

The Court: We will take up the case on the calendar, of United States -vs- John J. Grogan, and American Surety Company. Are you ready to proceed with the case, Gentlemen?

Mr. Wood: Yes, we are ready.

Mr. Brown: We are ready.

The Court: Very well.

PLAINTIFF'S CASE

Mr. Brown: If the court please, I have a photo-static copy of the original records in Washington, numbered 1 to 398 inclusive, and they are certified to in one certificate, so that I will ask that the clerk cut the certificate, so that I may use it.

The Court: Very well.

Mr. Brown: We will offer in evidence plaintiff's proposed exhibit No. 1.

Mr. Wood: I would like to have the record show that at this time the defendant, American Surety Company, objects to the introduction of any evidence upon the ground that the complaint in this action fails to state a claim against the defendant, upon which any relief can be granted.

The Court: It is the same question we have already considered, is it not.

Mr. Wood: Not entirely. I presume you would just as leave that we file briefs afterwards.

The Court: I think probably a brief will be just as well. We have already had one phase of it, and, I believe, I stated at the conclusion of my statement then, that if you had any further authorities I would hear them.

Mr. Wood: That is right.

The Court: That if you had something further, or later [30] or something you may have discovered that you think has an important bearing on that issue, I will hear it, as I suggested in that memorandum.

Mr. Wood: I will be glad to present all these questions later. I will preserve my record as I go along. I have something to add to that objection. It is based upon the fact that it appears to us on the face of the complaint now, after careful consideration, that the government without right or authority terminated this contract, and thereby rescinded it, and discharged it, so that there is no obligation upon the part of either defendant, as far as that is concerned, in damages at this time.

The Court: You claim that the Government had no right to terminate the contract when it did.

Mr. Wood: Under the allegations of the complaint, we claim that the contractor continued on from June 20, 1933, to July 20, 1934, and that was some thirteen months beyond the date of completion. Then, at that time, the Government served a notice terminating the right to further proceed under the contract. Our contention now is that the Government, under the contract and under law,

in giving the notice to the contractor at that time, thereby breached the contract and discharged them, as far as the defendants are concerned, so that there is no liability upon their part now, which is simply another way of saying the complaint does not state a cause of action.

The Court: Very well, you may proceed Mr. District Attorney.

Mr. Brown: We now offer in evidence plaintiff's exhibit No. 1.

Mr. Wood: There is no objection to plaintiff's exhibit No. 1.

(Whereupon plaintiff's exhibit No. 1 was received in evidence, without objection, and is in words and figures as follows, to-wit: [31]

PLAINTIFF'S EXHIBIT No. 1

Case #203

UNITED STATES OF AMERICA

GENERAL ACCOUNTING OFFICE

Pursuant to the Act of June 10, 1921, 42 Stat. 24, I hereby certify that the annexed documents, numbered C-1 to C-398 inc., are true copies of the official documents now on file in the General Accounting Office in the following case: John V. Grogan.

In Witness Whereof, I have hereunto set my hand and caused the seal of the General Account-

ing Office to be affixed this 3rd day of February, in the year 1937, at Washington

[Seal] R. N. ELLIRS,

Acting Comptroller General
of the United States.

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

General Accounting Office Form 7.

Mr. Brown: We offer in evidence, if the court please, the plaintiff's exhibit No. 2, and the plaintiff's exhibit No. 3, and I will say in that connection, we allege in paragraph 5, that notice to proceed to the contractor was given to the contractor on the 8th day of July, 1931, and the contractor commenced to perform under the contract. That is denied. [32]

Mr. Wood: I will say that we are encumbering the record with unnecessary documents. I will now admit that the allegations in paragraph 5 of plaintiff's complaint are true, in order to save proof upon that matter.

Mr. Brown: All right, we will withdraw the exhibit then.

The Court: Very well. That will simplify and expedite the matter.

Mr. Brown: Paragraph 7 seems to be the next paragraph in issue here.

The Court: Yes.

Mr. Wood: I will further concede, your honor, for the record, and save putting in unnecessary proof, that the defendant John V. Grogan was delayed four hundred and seventy three days in the performance of his contract and that at his request and with the consent of the plaintiff and of the defendant American Surety Company, the time for the completion of the work under the contract was extended until June 20, 1933.

Mr. Brown: I will withdraw the offer of exhibit 4 then, your honor.

The Court: Very well then. That is paragraph 7.

Mr. Brown: Yes.

Mr. Wood: There were some denials that were made necessarily at the time the pleadings were prepared. Then we did not have the facts fully before us, but after talking with Mr. Brown, what I can see I can concede I gladly will so as to save that proof.

Mr. Brown: If the court please, I have photostatic copies of the original documents, numbered by them, X-1 through X-12, inclusive. I have not marked the certificate of the General Counsel as to their authenticity. I don't need all of them. [33] I will ask that the clerk cut them, so that I will have access to those that I need.

The Court: Very well.

Mr. Brown: I offer in evidence plaintiff's exhibit No. 7.

Mr. Wood: No objection to plaintiff's exhibit No. 7. It may be received in evidence.

(Whereupon plaintiff's exhibit No. 7 was received in evidence, and is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 7

Case #203.

UNITED STATES OF AMERICA

FEDERAL WORKS AGENCY

PUBLIC BUILDINGS ADMINISTRATION

Washington

Dec. 7, 1940.

I hereby certify that the annexed documents numbered X-1 through X-12, inclusive, are true and correct copies of the official documents on file in this Agency.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Federal Works Agency to be affixed, on the day and year first above written.

[Seal]

ALAN JUHMTRUE,

General Counsel, Federal
Works Agency.

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

Mr. Brown: I offer in evidence, if the court please, plaintiff's exhibit No. 8. My purpose of this offer, which [34] is a letter from the United States to the Surety Company informing them that the contract had been cancelled, and inquiring of the Surety Company whether defendant, whether it desired to go ahead to complete the work. Now, I intend to follow that up with a letter back from the Surety Company, informing the United States that they did not desire to go ahead and complete the work. I intend in regular order to offer the contract.

Mr. Wood: The record already shows by admissions of the answers, that the notice had been given, the notice that the government relied upon, and these offered exhibits are unnecessary on that account, and I object to each of the offered exhibits as irrelevant for any purpose. I particularly object also to all this evidence as incompetent and particularly this type of evidence.

Mr. Brown: I offer exhibit No. 9, as long as objection was made to both of them I allege in the complaint that a notice was given to Grogan as to termination. My purpose is to show that it was done at the knowledge and request of the Surety Company. In connection with the notice in paragraph 8, there are certain admissions made, and denials made of that paragraph.

The Court: I will overrule the objection to the admission of these letters.

(Whereupon plaintiff's exhibits 8 and 9

were received in evidence, and are in words and figures as follows, to-wit):

PLAINTIFF'S EXHIBIT No. 8

Case #203

Inclosure

Babb-Piegan, Mont
Insp'n St T 1 SA 1751

LEGAL [35]

July 20, 1934.

The American Surety Company of New York,
100 Broadway,
New York, N. Y.

Gentlemen:

Referring to the contract of John V. Grogan for the construction of the Inspection Station at Babb-Piegan, Montana, you are advised that the contractor's right to proceed with the work is terminated to take effect on this date.

An inventory of the work performed and material installed and upon the site will be taken by a construction engineer, and he has been directed to notify you of the date fixed by him for taking such inventory in order that you may have a representative present at the time if you so desire.

You are requested to acknowledge the receipt of this letter stating whether or not you desire to

complete the work as surety on the contractor's bond after the inventory has been taken.

Respectfully,

(Signed) G. P. PEOPLES,

Director of Procurement.

PLAINTIFF'S EXHIBIT No. 9

Case #203

Babb-Piegán Mont. Insp'n Sta

AMERICAN SURETY COMPANY

of New York

100 Broadway, New York

F. W. Lafrentz, Chairman of the Board.

R. R. Brown, Vice Chairman.

A. F. Lafrentz, President.

Legal Department

George L. Naught, Vice President and General Counsel.

July 23, 1934.

In re: B#-372473-D C#-143922 John V. Grogan-to-U. S. A.

Procurement Division, Public Works Branch,
Treasury Department,
Washington, D. C. [36]

Att'n Dir. of Procurement.

Gentlemen:

In reply to your letter of July 20th in regard to the contract of John V. Grogan for the con-

struction of the inspection Station 'at Babb-Piegan, Montana, you will please be advised that this Company as surety on the contractor's bond does not desire to complete the work. We therefore request that bids be obtained and the contract awarded to the lowest bidder.

Very truly yours,

GEORGE R. CROSBY,

Attorney.

(Received Division of Procurement Public Works
Branch Jul 24 1934 S-1. Noted.....
Ans's.....19)

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

Mr. Brown: We offer in evidence Plaintiff's Exhibit No. 10.

Mr. Wood: At this time the defendant objects to Plaintiff's Exhibit 10 as incompetent; it not appearing therefrom, or from any other evidence, that the bids are proposed to be let as covered by exhibit 10 for the completion of the work under the Grogan contract in accordance with the specifications and plans of that Grogan contract. Also object to it as irrelevant. So that there be no misunderstanding, I am not objecting to the way it is proved, but my objection as to competency goes to the other question, failure to lay a foundation for putting in evidence of this character.

Mr. Brown: This is an advertisement for bids.

On its face [37] it says that bids will be received at treasury department, for furnishing all material, all labor and materials and performing all work for completion of construction of the United States Inspection Station at Babb-Piegan, Montana. Specifications may be obtained, and so forth, from the government office.

The Court: It may be admitted in evidence. The objection is overruled.

(Whereupon plaintiff's exhibit 10 was received in evidence, and is in words and figures as follows, to-wit):

PLAINTIFF'S EXHIBIT No. 10

Case #203

Babb-Piegan, Mont., U. S. Insp. Sta.
Completion

Standard Government Form of Invitation for Bids
(Construction Contract)

Treasury Department, Procurement Division, Public Works, Branch, Washington, D. C., May 22, 1934. Sealed Bids in Duplicate subject to the conditions contained herein, and of executive order No. 6646, Dated March 14, 1934, will be publicly opened in this office at 2 P. M., June 19, 1934, for furnishing all labor and materials and performing all work for completion of construction of the United States Inspection Station at Babb-

Piegan, Montana, Specifications may be obtained from the Custodian at the Building or at this office in the discretion of the assistant director of procurement, public works branch. W. E. Reynolds, assistant director of procurement, public works branch.

Notice to Printer

This notice when used as an advertisement must be set Solid. The notice is to be used as a pay advertisement only when accompanied by written authority from the Department. The law forbids payment for advertisements not previously authorized. [38]

Where copies of plans are requested, a deposit of \$ No will be required to insure their return.

Guarantee will be required with each bid as follows: (See paragraph 8 of instructions to bidders and paragraphs 7-11 of the specification).

Performance bond will be required as follows: 50 per cent of the amount of the contract, if the contract amount to \$2,000 or more.

Liquidated damages for *dealy* will be as provided in the specification.

Partial payments will be made. (See article 16 of contract as modified by the specification).

Article on patents will be made a part of the contract. (See directions on back of contract).

Preference for domestic materials is required by title 111 of the act of March 3, 1933, Public No. 428. (Copy Attached).

Bids must be submitted upon the Standard Government Form of Bid and if the contract amount to \$2,000 or more, the successful bidder will be required to execute the Standard Government Form of Contract for Construction.

The right is reserved, as the interest of the Government may require, to reject any and all bids, to waive any informality in bids received, and to accept or reject any items of any bid, unless such bid is qualified by specific limitation.

Envelopes containing bids must be sealed, marked, and addressed as follows:

The Assistant Director of Procurement,
Public Works Branch,
Treasury Department,
Washington, D. C.

Bids for Completion
U. S. Insp. Station
Babb-Piegan, Montana.

To be opened at 2 P. M., June 19, 1934.

Note—See Standard Government Instructions to Bidders and copy of the Standard Government Form of Contract, Bid Bond, and Performance Bond, which may be obtained upon application.

Domestic Articles of Materials. The attention of Bidders is called to the Act of Congress, approved March 3, 1933, (Public No. 428) which provides:

Title 111.

Sec. 3 (A) Every contract for the construc-

tion, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured [39] articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be in the United States except as provided in section 2: Provided however, that if the head of the department or independent establishment making the contract shall find that in respect to some particular articles, materials, or supplies it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to that particular article, material, or supply, and a public record made of the findings which justified the exception.

(B) If the head of a department, bureau, agency or independent establishment which has made any contract containing the provision required by subsection (A) Finds that in the performance of such contract there has been a failure to comply with such provisions, he

shall make public his findings, including therein the name of the contractor obligated under such contract, and no other contract for the construction, alteration, or repair of any public building or public work in the United States or else where shall be awarded to such contractor, subcontractors, material men, or suppliers with which such contractor is associated or affiliated, within a period of three years after such finding is made public.

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

Mr. Brown: Now, I offer in evidence Plaintiff's Exhibit No. 11, which is the contract entered into by the government.

Mr. Wood: We object to the offered exhibit, this being plaintiff's exhibit 11, upon the ground that it is incompetent, in that no proof or sufficient foundation has been laid or established that the government was proposing to complete the Babb-Piegan Station in accordance with the plans and specifications and contract with Grogan; also object to it as irrelevant.

The Court: Overruled.

Whereupon Plaintiff's Exhibit No. 11 was received in evidence, and is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 11.

Case #203

TIPW 359

Standard Form No. 23

Approved by the President

Nov. 19, 1926

STANDARD GOVERNMENT FORM OF
CONTRACT

(Construction) [40]

Procurement Division

Treasury Department

(Department)

McGinnis & Lancaster,

Box 134,

Browning, Montana

(Contractor)

Contract for completion of construction amount,
\$4,280.00

Place United States Inspection Station, Babb-
Piegan, Montana.

CONTRACT FOR CONSTRUCTION

This Contract, entered into this 22nd day of August, 1934, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and McGinnis & Lancaster, a corporation, a partnership, consisting of Daniel B. McGinnis and Wesley Earl Lancaster, of the city of Browning, in the State of Montana, hereinafter called the contractor,

Plaintiff's Exhibit No. 11 (Continued)

witnesseth that the parties hereto do mutually agree as follows:

Article 1. Statement of work: The contractor shall furnish all labor and materials, and perform all work required for completion of the construction of the Inspection Station at Babb-Piegan, Montana, for the consideration of four thousand two hundred eighty dollars (\$4,280.00), in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specification for completion of construction of the United States Inspection Station at Babb-Piegan, Montana, dated May 22, 1934.

The work shall be commenced as soon as practicable after the date of receipt of notice to proceed, and shall be completed within sixty (60) calendar days after the date of receipt of notice to proceed.

Article 2. Specifications and drawings.—The contractor shall [41] keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the con-

Plaintiff's Exhibit No. 11 (Continued)

tracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary unless otherwise provided. Upon completion of the contract the work shall be delivered and undamaged.

Article 3. Changes—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be deter- [42] mined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Plaintiff's Exhibit No. 11 (Continued)

Article 4. Changed conditions.—Should the contractor encounter or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

Article 5. Extras—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article 6. Inspection—(a) All material and workmanship (If not otherwise designated by the specifications) shall be subject to inspection, examination, and test by the Government inspectors at any and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on.

Plaintiff's Exhibit No. 11 (Continued)

The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily [43] corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

(b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is

Plaintiff's Exhibit No. 11 (Continued)

found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 per cent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of [44] production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

Article 7—Materials and workmanship—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the speci-

Plaintiff's Exhibit No. 11 (Continued)

fications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates installing, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable. [45]

Article 8. Superintendence by contractor—The contractor shall give his personal superintendence of the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

Article 9. Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Ar-

Plaintiff's Exhibit No. 11 (Continued)

ticle 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages [46] because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of

Plaintiff's Exhibit No. 11 (Continued)

God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his finding of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

Article 10. Permits and care of work—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

Article 11. Eight-hour law—Convict labor—(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours

Plaintiff's Exhibit No. 11 (Continued)

in any one calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of five [47] dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of the act of June 19, 1921 (37 Stat. 137), relating to hours of labor.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article 12. Covenant against contingent fees—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 13.—Other contracts—The Government may award other contracts for additional work, and

Plaintiff's Exhibit No. 11 (Continued)

the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

Article 14. Officials not to benefit—No member of or Delegate to Congress, or Resident Commissioner, shall be admitted to [48] any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15. Dispute—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Article 16. Payments to contractors—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and pre-

Plaintiff's Exhibit No. 11 (Continued)

paratory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptance of all work covered by the contract: Provided, however, That the contracting officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: and provided further, that on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, [49] including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified

Plaintiff's Exhibit No. 11 (Continued)

voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

Article 17. Additional security—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Article 18. Definitions—(a) The term “head of department” as used herein shall mean the head of the executive department or independent establishment involved, and “his representative” means any person authorized to act for him.

(b) The term “contracting officer” as used herein shall include his duly appointed successor or his duly authorized representative. [50]

Article 19. Alterations—The following changes were made in this contract before it was signed by the parties hereto:

The erasure of the words “other than the contracting officer”, in paragraph a, Article 18.

In Witness Whereof, the parties hereto have exe-

Plaintiff's Exhibit No. 11 (Continued)

cuted this contract as of the day and year first written.

THE UNITED STATES OF
AMERICA

By W. E. REYNOLDS

Acting Director of Procurement.

Treasury Department
(official title)

McGINNIS & LANCASTE

Contractor

By W. E. LANCASTE

DAN McGINNIS

Browning, Montana.

(business address)

WESLEY EARL LANCASTE

DANIEL B. McGINNIS

Two Witnesses:

J. L. SHERBURNE

MILDRED BOWE

I, certify that I am the secretary of the corporation named as contractor herein;

that

who signed this contract on behalf of the contractor,
was then of said corporation;

that said contract was duly signed for and in behalf
of said corporation by authority of its governing
body, and is within the scope of its corporate powers.

(Corporate Seal)

Plaintiff's Exhibit No. 11 (Continued)

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry,

who signed this contract for the
had authority to execute the same, for
the individual who signs similar contracts on behalf
of this corporation with the public generally.

Contracting Officer. [51]

This contract is authorized by the acts of May 29, 1928, V. 45, p. 919; Dec. 20, 1928, V. 45, p. 1041; Mar. 26, 1930, V. 46, p. 120; May 13, 1930, V. 46, p. 276; May 15, 1930, V. 46, p. 349.

Directions for Preparation of Contract

1. This form shall be used for every formal contract for the construction or repair of public buildings or works, but its use will not be required in foreign countries.

2. There shall be no deviation from this standard contract form, except as provided for in these directions, without prior approval of the Director of the Bureau of the Budget obtained through the Interdepartmental Board of Contracts and Adjustments. Where interlineations, deletions, additions, or other alterations are permitted, specific notation of the same shall be entered in the blank space following the article entitled "Alterations" before signing. This article is not to be construed as general authority to deviate from the standard form. Deletion of the descriptive matter not applicable in the preamble need not be noted in the article entitled "Alterations."

Plaintiff's Exhibit No. 11 (Continued)

3. The blank space of Article 1 is intended for the insertion of a statement of the work to be done, together with place of performance, or for the enumeration of papers which contain the necessary data.

4. If it be deemed necessary to include an article on Patents the Invitation to Bidders shall so state and the following article be used:

Article Patents—The contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article, or appliance furnished or used in the performance of this contract, excepting patented articles required by the Government in its specifications, the use of which the contractor [52] does not control.

5. Where only one payment is contemplated, upon completion of the contract, all except paragraph (d) of Article 16, "Payments to Contractor", must be stricken out.

6. If approval of the contract is required before it shall become binding, the following article must be added: Article Approval—This contract shall be subject to the written approval of
. and shall not be binding until so approved. Contracts subject to approval are not valid until approved by the authority designated to approve them, and the contractor's copy will not be delivered, nor any distribution made, until such approval. All changes and deletions must have been made before the contract is forwarded for approval.

Plaintiff's Exhibit No. 11 (Continued)

7. The number of executed copies and of certified copies, designation of disbursing officer, statement of appropriation, amount of bond, designation of place of inspection, as well as other administrative details, shall be as directed by the department to which the contract pertains.

8. All blank spaces must be filled in or ruled out. The contract must be dated, and the bond must bear the same or subsequent date.

9. An officer of a corporation, a member of a partnership, or an agent signing for the principal, shall place the signature and title after the word "By" under the name of the principal. A contract executed by an attorney or agent on behalf of the contractor shall be accompanied by two authenticated copies of his power of attorney, or other evidence of his authority to act on behalf of the contractor.

10. If the contractor is a corporation, one of the certificates [53] following the signatures of the parties must be executed. If the contract is signed by the secretary of the corporation, then the first certificate must be executed by some other officer of the corporation under the corporate seal, or the second certificate executed by the contracting officer. In lieu of either of the foregoing certificates there may be attached to the contract copies of so much of the records of the corporation as will show the official character and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

Plaintiff's Exhibit No. 11 (Continued)

11. The full name and business address of the contractor must be inserted, and the contract signed with his usual signature. Typewrite or print name under all signatures to contract and bond.

12. The contracting officer must fill in the citation of the act authorizing the contract as indicated at the end of the last page of the contract.

13. The invitation, Bid, Acceptance, and Instruction to Bidders are not to be incorporated in the contract.

14. The specifications should include a paragraph stating the amount of liquidated damages that will be paid by the contractor for each calendar day of delay, as indicated in Article 9 of the contract.

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

Mr. Wood: I am not objecting to the character of the evidence because these are photostatic copies or anything of that sort. [54]

The Court: I understand that, Mr. Wood.

Mr. Brown: If the court please, we now offer in evidence plaintiff's exhibit No. 12, which is a public voucher of the contractors to public vouchers of the contractor executed in payment for work done on this exhibit 11, together with two checks, and the two checks total the amount of the contract price.

Mr. Wood: Let the record show that Mr. Brown and I have agreed heretofore as to this character

of evidence. So far as this kind of proof is being made it will not be objected to. There is no objection, in other words, to the competency, I would say to exemplified or photostatic copies, but I do object to plaintiff's offered exhibit No. 12 upon the ground first that it is incompetent, no sufficient foundation having been laid, or proof made that the work done, or the payment made for it was for the purpose of completing the Grogan contract in accordance with the plans and specifications, etc, of the Grogan contract, and furthermore it is likewise irrelevant.

The Court: Overruled.

Whereupon plaintiff's exhibit 12 was received in evidence, and is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 12

Case #203

Washington, D. C.

Treasury

Nov. 24, 1934 2,380

TREASURER OF THE UNITED STATES

Division of

Disbursement

(Seal)

Object for which drawn

592134

Public Building

Construction

Pay in Dollars Two Thousand Three Hundred

Eleven 20/100 \$2311.20 [55] to the Order of McGinnis & Lancaster

G. F. ALLEN

Chief Disbursing Officer

By Besnk

10-007

(Endorsed on back)

McGinnis & Lancaster

W. E. Lancaster

Dan McGinnis

Received Payment From The Treasurer of the United States Nov 30, 1934 Helena Branch Federal Reserve Bank of Minneapolis 93-26 Helena, Montana.

Public Voucher for Purchases, and Services Other Than Personal.

Standard Form No. 1084

Nov 11, 1934

592134

Voucher prepared Babb-Piegan, inspection Station, Montana. U. S. Treasury Department Office of Supervising Architect Appropriation: "Inspection Station, Babb-Piegan, Montana. 2882402

The United States, Dr. To McGinnis & Lancaster.

Address Browning, Montana.

(Paid By G. F. Allen Chief Disbursing Officer
Division of Disbursement Treasury Department
CK.SYM 10-007

(Payee must NOT Contract No. TIpw-359 Date 8-22-34
use this space) Activity . . INsp Sta. Babb-Piegan Montana

No. and Date of Order	Date of Delivery or Service	Articles or Services	Amount
7-20-1935	11-9-34	Contract for com- pletion construc- tion.	\$4,280.00
		Less value work uncomplete	1,712.00
			<hr/> 2,568.00
		Less 10% retained	256.80
			<hr/> 2,311.20
		Less payments on account	0.00
			<hr/>
		Total	\$2,311.20

I certify that the above bill is correct and just,
and that payment therefor has Not been received.

Payee—McGinnis & Lancaster

DAN MCGINNIS

W. E. LANCASTER

Title-Partners [56]

I certify that the above articles were received
in good condition, after due inspection, acceptance,
and delivery prior to payment as required by law,
or the service performed as stated: that they were
procured under the contract numbered above or
unnumbered contract attached hereto, or that they
were procured without written contract, in open
market, and with or without advertising under the
circumstances stated in No.....of “method of

or Absence of Advertising" shown on reverse hereof, and were necessary for the public service; and that the prices charges are just and reasonable and in accordance with the agreement.

Approved for \$2311.20

By direction of the Secretary

H. S. ROBINSON

Superintendent, Accounts

LYLE G. HOOVER

Custodian.

Paid by Check No. 2380, dated Nov. 24, 1934

Washington, D. C.

Treasury

Apr. 22, 1935 4,453

TREASURER OF THE UNITED STATES

Division of

Disbursement

(Seal)

Object for which

drawn

1354521

Public Building

Construction

Pay In Dollars One Thousand Nine Hundred Sixty Eight 80/100 \$1,968.80 To the Order of McGinnis & Lancaster

G. F. ALLEN

Chief Disbrusing Officer

By Besnk 10-007

Received payment from the Treasurer of the United States, Apr. 27, 1935 Helena, Branch Federal Reserve Bank of Minneapolis 93-26 Helena, Montana 93-26

(endorsed on back)

McGinnis & Lancaster

W. E. Lancaster

Dan McGinnis

Public Voucher for Purchases, and Services Other Than Personal. Standard Form No. 1084. No. 1354521. [57]

Babb-Piegan, Montana 2/8/35.

Procurement Public Works Branch.

U. S. Treasury Department office of Supervising Architect.

Appropriation "inspection Station Babb-Piegan, Montana".

2x82402 (Received-Feb 21, 1935)

The United States Dr. To McGinnis & Lancaster.

Address Browning, Montana.

(Payee must NOT use this space) Contract No. TIPW-359 Babb-Piegan, Activity Completion Contract Mont.

Expenditure Symbol	Date of Delivery and Service	Articles or Services	Amount
7/20/35	1/28/35	Contract for completion construction	\$4,280.00
		Less Voucher dated 11/9/34.	\$2,311.20
			<hr/> \$1,968.80

(Received Feb. 14, 1935
District Engineer
Kansas City, Mo.

Total	<hr/> \$1,968.80
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I certify that the above bill is correct and just,
and that payment thereof has Not been received.

McGINNIS & LANCASTER

W. E. LANCASTER

DAN MCGINNIS

I certify that the above articles were received
in good condition after due inspection, acceptance,
and delivery prior to payment as required by law,
or the services performed as stated: that they were
procured under the contract numbered above or the
unnumbered contract attached hereto, or that they
were procured without written contract, in open
market, and with or without advertising, under the
circumstances stated in No.....of "Method of
or Absence of Advertising" shown on reverse
hereof, and were necessary for the public service;
and that the prices charged are just and reason-
able and in accordance with the agreement.

Approved for \$1968.80

By direction of the Secretary

H. G. ROBINSON

Superintendent, Accounts
Division

LYLE HOOVER

Custodian [58]

Paid by Check No. 4453. Apr. 22, 1935. C-254.

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow,
Clerk.

Mr. Brown: I might say that the two checks total the amount of \$4,280.00, the amount of the contract price. However, the Government only claims as against the defendant the amount of \$3,781.00, that it alleges in its complaint. I make that statement so that there won't be any contention that we might have a right to amend our complaint to conform to the proof.

Mr. Wood: Perhaps we should also state for the record, so that the court better understands, that Mr. Brown and I have agreed heretofore that there were some items included in the \$4,280.00 payment that were not properly chargeable against Mr. Grogan individually. That is why the amount was reduced to \$3,781.00.

The Court: Very well.

Mr. Brown: Now, if the court please, in reference to paragraph 9 of the complaint, that was denied. That paragraph deals largely with the payment that we claim the United States paid, and that we are attempting to recover. We allege that they paid the construction engineer \$2,288.62. I am going to offer those checks in substantiation of that. With reference to paragraph 9, your honor, Mr. Wood tells me that he will agree that the Government paid two checks to J. V. Levine, a construction engineer, between the first day of June 1933 to the thirtieth day of June, 1934, as alleged in that paragraph, the amount of \$2,137.54. Now, that is a little less than the amount that we plead, but we have totaled [59] the checks that I have, and that is

the total, this \$2,137.54, and Mr. Wood also tells me that he will agree that the Government paid to various of its engineers, in salaries, and in repayment for expenses, for traveling expenses incurred as alleged in paragraph 9, on January 10, July 27, October 19, November 8, and December 7, 1934, the amount of \$414.00. As I understand it that is for the purpose of expediting the trial, and, of course, there is no admission of any liability, or anything of that kind.

Mr. Wood: Mr. Brown's statement in the record is correct. I do make those admissions, and agree that the sums mentioned were in fact paid to the persons to whom they were paid, but I admit nothing more.

The Court: Very well.

Mr. Brown: Mr. Wood tells me in regard to paragraph 10 of the Complaint, that he will admit that the United States paid to Grogan under his contract the amount of \$49,602.50. The amount that we alleged in that paragraph in that complaint.

Mr. Wood: The record may so show. I do agree that that payment was made.

The Court: Very well.

Mr. Brown: I think the Government has established its case in chief. The matters that were in controversy were agreed to.

Mr. Wood: I now desire to move to dismiss this action as against the American Surety Company, which is the only defendant before the court, and the only defendant that has been served, upon the

ground that upon the facts and the law the plaintiff has shown no right to relief. That, of course, is in line with the objection made at the opening of the case to the introduction of any evidence, and beyond that we have no [60] proof to offer, or decline to introduce any proof, and we rest our own case.

The Court: I will take the case then, under advisement subject to your objections, and consider your briefs.

Mr. Brown: I would like to have the Court grant us twenty days within which to file our brief, and our proposed Findings of Fact and Conclusions of Law, and we would like to have five days to reply to any brief that the defendant filed in behalf of the Surety Company.

Mr. Wood: I suppose we can have twenty days intervening to file our brief.

The Court: Very well, if you deem that sufficient.

Mr. Brown: Mr. Wood has ordered a transcript for the Court's convenience, and I would ask that the order as to the brief might be that we have twenty days from the time of the delivery of the transcript.

The Court: That will be satisfactory.

[Endorsed]: Filed December 5, 1941. [61]

Thereafter, on April 27, 1942, Findings of Fact and Conclusions of Law were duly filed herein, being in the words and figures following, to wit: [62]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause came regularly on for trial before the Court, sitting without a jury, on the 29th day of November, 1941, as to the defendant, American Surety Company, a Corporation, the defendant, John V. Grogan, having never been served with process herein; the plaintiff was represented by its counsel, R. Lewis Brown and W. D. Murray, Assistant Attorneys of the United States, in and for the District of Montana, and the defendant, American Surety Company, a corporation, was represented by its counsel, Messrs. Wood & Cooke; thereupon, oral and documentary evidence was introduced by and on behalf of the plaintiff herein, and at the end of the plaintiff's case, the defendant, American Surety Company, announced it had no evidence to offer; thereupon, each of the parties was by the Court given time within which to prepare and submit briefs and proposed findings of fact and conclusions of law, and each of the parties having submitted its said brief, proposed findings of fact and conclusions of law, and after consideration by the Court of the evidence and the pleadings and the briefs of the parties, and the Court being fully advised in the premises, now makes and orders filed these, its findings of fact and conclusions of law, as follows:

FINDINGS OF FACT

1.

That on the 24th day of June, 1931, the plaintiff and the [63] defendant, John V. Grogan, entered into the contract, in writing, which is attached to the plaintiff's complaint as Exhibit "A", for the construction and erection of certain buildings at the United States Inspection Station at Babb-Piegan, in the State and District of Montana, for the price of \$49,970.00, to be paid to the said contractor upon full completion of the work in the time and in the manner provided in said contract; that while the said contract was in full force and effect, certain changes in the work to be done and certain extra work and materials were agreed to be furnished of the reasonable value of \$3921.00, which said sum the United States agreed to pay, which increased the amount to be paid by the United States to the contractor to the sum of \$53,891.00 for the completion of the work at the time and in the manner as provided in the said contract.

2.

That at all of the times mentioned in the plaintiff's complaint and the evidence, the defendant, American Surety Company, a Corporation, was, and continued to be, a corporation duly organized and authorized to become a surety for hire.

3.

That on or about the 29th day of June, 1931, the defendant, American Surety Company, a Corpora-

tion, became a surety for the defendant, John V. Grogan, and his faithful performance of the contract, and the said defendants made, executed, and delivered to the plaintiff the instrument and bond attached to the plaintiff's complaint as Exhibit "B", and that the said Surety Company was a surety for hire on said bond.

4.

That notice to proceed under said contract, as provided by the terms thereof, was given to the said John V. Grogan on the 8th day of July, 1931, and he thereupon commenced his performance of said contract.

5.

That for causes considered excusable by the plaintiff under Article 9 of the said contract, the plaintiff, at the request of the defendant, John V. Grogan, and with the consent [64] of the defendant Surety Company, extended the time for the completion of the work under the said contract to June 20, 1933.

6.

That it was provided in said contract that the contractor should pay to the plaintiff the amount of \$25.00 a day as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract.

7.

That the defendant, John V. Grogan, had not completed the work he agreed to perform under the said contract upon the 20th of June, 1933, and he

had not completed all the work he promised and agreed to do in said contract on the 20th day of July, 1934, and on said 20th day of July, 1934, he being in default under said contract and having breached the same, and because of said default and breach, and as provided in the said contract, the plaintiff, on the said 20th day of July, 1934, gave to the defendant, John V. Grogan, a notice, in writing, that his right to proceed under the said contract was terminated on said 20th day of July, 1934.

8.

That because of the failure of the said defendant, John V. Grogan, to perform his contract, as he was required to do, and to complete the work which he had promised and agreed to complete within the time specified in said contract and granted by the plaintiff, it became necessary for the plaintiff to cause the said work to be completed and performed, and at the request of the defendant, American Surety Company, a Corporation, the plaintiff advertised for bids for doing and completing the said work, and let the contract for completing the said work to the lowest, responsible bidder.

9.

That because of the failure of the defendant, John V. Grogan, to perform his said contract and his breach thereof, the plaintiff was required to, and did, necessarily lay out and expend the sum of \$2,044.04 more in causing the said work [65] to be done and in completing the said contract than it

would have been required to lay out and expend had the said defendant, John V. Grogan, duly performed his said contract and completed the work, as he had promised and agreed to do.

10.

That 395 calendar days elapsed between the 20th day of June, 1933, the time fixed under the contract for the completion of the said work, and the 20th day of July, 1934, the date upon which the defendant's, John V. Grogan's, right to proceed under the contract was terminated by the plaintiff.

11.

That, except as expressly contrary hereto, the Court finds all of the facts set out in the plaintiff's complaint to be true and established by the evidence, and the affirmative facts set out in the Answer of the defendant, American Surety Company, a Corporation, to be not established by the evidence.

From the foregoing findings of fact, the Court concludes the law, as follows:

CONCLUSIONS OF LAW

1.

That the Court has jurisdiction hereof.

2.

That because of the failure of the defendant, John V. Grogan, to complete his said contract and perform the work he agreed therein to do and perform, the plaintiff was required to perform the

same at an additional cost and expense to it in the amount of \$2,044.04, and has been damaged in that amount.

3.

That by reason of the delay of 395 calendar days on the part of the defendant, John V. Grogan, in his completion of the said contract, the palintiff has been damaged in the sum of \$9,875.00.

4.

That the plaintiff is entitled to recover of and from the defendant, American Surety Company, a Corporation, [66] the sum of \$2,044.04, and the further sum of \$9,875.00, with interest thereon at the rate of six per cent (6%) per annum from the 1st day of November, 1937, and for its costs of suit herein necessarily expended, and is entitled to a judgment therefor.

Done and dated, April 27th, 1942.

CHARLES N. PRAY

Judge.

Lodged in Clerk's Office Jan. 20, 1942. C. R. Garlow, Clerk.

[Endorsed]: Filed April 27, 1942. [67]

Thereafter, on April 27, 1942, Judgment was duly filed and entered herein, being in the words and figures following, to-wit: [68]

In the District Court of the United States
District of Montana
Great Falls Division

No. 203

UNITED STATES OF AMERICA,
Plaintiff,
v.

JOHN V. GROGAN and AMERICAN SURETY
COMPANY, A Corporation,
Defendants.

JUDGMENT

This cause came regularly on for trial before the Court, Honorable Charles N. Pray, Judge presiding, sitting without a jury, on the 29th day of November, 1941, as to the defendant, American Surety Company, a corporation; plaintiff was represented by its counsel, W. D. Murray and R. Lewis Brown, Assistant Attorneys of the United States in and for the District of Montana, and defendant, American Surety Company, a corporation, was represented by its counsel, Messrs. Wood & Cooke; thereupon oral and documentary evidence was introduced by and on behalf of the plaintiff herein and no evidence was introduced either by or on behalf of the defendant, American Surety Company, a corporation; thereupon and at the close of plaintiff's evidence, both parties having rested, the plaintiff and the defendant, American Surety Company, a corporation,

asked for and were granted time within which to prepare, serve and filed their briefs and proposed findings of fact and conclusions of law; said briefs and proposed findings of fact and conclusions of law thereafter having been filed, the cause was submitted to the Court for consideration and decision.

Thereafter, the Court, having fully considered all of the evidence, introduced, as well as the admissions made by counsels at the trial of the cause, together with the briefs of the parties hereto, and being duly advised as to the law and the facts, did on the 15th day of April, 1942, render its opinion herein in favor of the plaintiff and against the defendant, [69] American Surety Company a corporation, and did thereafter and on the 27th day of April, 1942, make and sign and order filed its findings of fact and conclusions of law herein, and the same were entered and filed in the office of the Clerk of this Court on said date and are herein referred to and hereof made a part as fully and as completely as though here set out at length.

Wherefore, by reason of the law and the premises and the findings of fact and conclusions of law of the Court, It Is Ordered, Adjudged and Decreed and this does Order, Adjudge and Decree that the plaintiff, United States of America, do have and recover of and from the defendant above-named, American Surety Company a corporation, the sum of \$11,-919.04, together with interest at the rate of six (6%) per cent. per annum from the 1st day of November, 1937, amounting to the further sum of \$2,-

481.15, amounting in all, principal and interest, to the sum of \$14,400.19, together with the plaintiff's costs and disbursements herein necessarily incurred, amounting to the sum of \$33.20.

Done and Dated April 27th, 1942.

CHARLES N. PRAY

United States District Judge.
District of Montana.

[Endorsed]: Filed & Entered Apr. 27, 1942. [70]

Thereafter, on July 21, 1942, Notice of Appeal was duly filed herein, being as follows, to wit: [71]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To United States of America, the above named Plaintiff, and to R. Lewis Brown, Assistant Attorney for the United States, in and for the District of Montana, its attorney, and to the Clerk of the Above Named Court:

You and each of you will please take notice that the Defendant, American Surety Company, a corporation, in the above entitled action, by and through the undersigned its attorneys, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, and the whole thereof, made and entered in favor of

the Plaintiff and against the Defendant, American Surety Company, a corporation, in the above entitled action upon the 27th day of April, 1942.

Dated this 20th day of July, A. D. 1942.

STERLING M. WOOD and

ROBERT E. COOKE

By STERLING M. WOOD

Attorneys for Defendant,

American Surety Company,
a corporation.

[Endorsed]: Filed July 21, 1942. C. R. Garlow,
Clerk. [72]

Thereafter, on July 21, 1942, Cost Bond on Appeal was duly filed herein, being as follows, to wit: [73]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, American Surety Company, a corporation, as Principal, and New York Casualty Company as Surety, are held and firmly bound unto United States of America in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said United States of America, to which payment well and truly to be made we bind

ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals this 29th day of June in the Year of Our Lord 1942.

Whereas, lately in the above entitled action a judgment was rendered against the Defendant, American Surety Company, a corporation, therein, and the said Defendant is about to appeal, to the United States Circuit Court of Appeals for the Ninth Circuit, from the said judgment, and the whole thereof, to reverse the said judgment;

Now, Therefore, the condition of the above obligation is such that if the above named Defendant, American Surety Company, a corporation, shall pay all costs, if the said appeal is dismissed or judgment affirmed, or shall pay such costs as the appellate [74] court may award if the said judgment is modified, then the above obligation to be void; else to remain in full force and virtue.

In accordance with Rule 90 of the Rules of the above-named District Court of the United States, for the District of Montana, the said New York Casualty Company the surety herein, expressly agrees that in case of a breach of any condition of this bond that the above named court, upon notice to the said surety of not less than ten days, may proceed summarily in the above entitled action in which this bond is being given, to ascertain the amount which the said surety is bound to pay on account of such breach, and render judgment there-

for against the said surety, and award execution therefor.

[Seal] AMERICAN SURETY COM-
PANY, a corporation
By N. KLOTZ
Its Resident Vice-President

Attest:

A. DONALDSON
Res. Asst. Secretary

[Seal] NEW YORK CASUALTY
COMPANY
By W. D. HABISH
Its Resident Vice-President

Attest:

A. DONALDSON
Resident Asst. Secretary

Countersigned:

SCHROEDER BROS. CO.
By JOHN W. SCHROEDER,
Secy.
Resident Agent New York
Casualty Company at
Helena, Montana.

[Endorsed]: Filed July 21, 1942. C. R. Garlow,
Clerk. [75]

Thereafter, on July 29, 1942, Stipulation as to contents of Record on Appeal was duly filed herein, as follows, towit: [76]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the undersigned attorneys for the respective parties to the above entitled action as follows, to-wit:—

I.

That the part of the record in the above entitled action to be included in the record on appeal of said action from the above named Court to the United States Circuit Court of Appeals for Ninth Circuit shall be as follows, to-wit:—

- (a) Plaintiff's Complaint.
- (b) Notice and motion of October 7, 1940 to strike portions of Plaintiff's Complaint.
- (c) Minute order of July 22, 1941, denying the last mentioned motion.
- (d) Answer of the Defendant, American Surety Company of New York.
- (e) Original transcript of evidence taken at the trial of said action and prepared by the court reporter who reported the trial.
- (f) Findings of Fact and Conclusions of Law adopted by the Court.
- (g) Judgment of April 27, 1942
- (h) This stipulation.
- (i) Notice of Appeal of the Defendant, American Surety Company of New York.

(j) Cost bond on appeal of the Defendant,
American Surety Company of New York. [77]

This stipulation is made under Rule 75 (f) of the Rules of Civil Procedure for the District Courts of the United States and instead of serving designations as provided for in Rule 75 (a) of the aforesaid rules.

Dated this 22nd day of July, A. D. 1942.

R. LEWIS BROWN

Assistant Attorney of the
United States, in and for
the District of Montana

STERLING M. WOOD and
ROBERT E. COOKE

By STERLING M. WOOD

Attorneys for Defendant,
American Surety Company,
a corporation.

[Endorsed]: Filed July 29, 1942. C. R. Garlow,
Clerk. [78]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for Ninth Circuit, that the foregoing volume consisting of

81 pages, numbered consecutively from 1 to 81 inclusive, constitutes a full, true and correct transcript of all portions of the record in Case Number 203, United States of America vs. John V. Grogan and American Surety Company, a corporation, designated by the parties as the record on appeal herein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said Transcript of Record amount to the sum of Thirty-seven and no/100ths.....Dollars, and have been paid by the appellant.

Witness my hand and the seal of said court at Great Falls, Montana, this 29th day of July, A. D. 1942.

[Seal]

C. R. GARLOW,

Clerk, U. S. District Court,
District of Montana.

By C. G. KEGEL

Deputy Clerk. [81]

[Endorsed]: No. 10229. United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed August 24, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10229

AMERICAN SURETY COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION UNDER RULE 19

Comes now the Appellant in the above-entitled action, by and through the undersigned its attorneys, and in compliance with paragraph 6, Rule 19, of the rules of the above-named Court, states that the points on which the said Appellant intends to rely on the appeal taken in the said action are as follows, to-wit:

(a) That under the pleadings and the evidence in said action the Appellee is not entitled in any event to recover liquidated damages;

(b) That there has been a complete failure of proof by the Appellee and that accordingly the judgment from which the appeal has been taken in the above-entitled action is without support in the record;

(c) That there is no evidence in the record to support the judgment from which the appeal in the above-entitled action has been taken.

And the said Appellant further states that the parts of the record which it deems necessary for a consideration of the appeal in the above-entitled action are the pleadings, evidence and judgment, and preliminary motions and orders, all as more particularly set forth in the stipulation of the parties to the said action as to the part of the record to be included in the record on appeal, to which said stipulation reference is hereby made.

Dated at Billings, Montana, this 10th day of September, A. D. 1942.

STERLING M. WOOD

and

ROBERT E. COOKE

By STERLING M. WOOD

Attorneys for Appellant.

[Endorsed]: Filed Sep. 14, 1942.

No. 10,229 10

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

AMERICAN SURETY COMPANY
(a corporation),

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

STERLING M. WOOD,

ROBERT E. COOKE,

Securities Building, Billings, Montana,

Attorneys for Appellant.

FILED

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I.

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AMERICAN SURETY COMPANY

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vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF FOR APPELLANT.

**STATEMENT OF THE PLEADINGS AND
JURISDICTIONAL FACTS.**

This action was tried on the complaint of United States of America (Tr. 2 to 26), the Appellee in this Court. It is alleged in the said complaint (Tr. 2) and admitted in the answer of Appellant (Tr. 30) that United States of America brought this action in its own behalf, and in the United States District Court for the District of Montana, by reason of the provisions of Section 41, Title 28, United States Codes. Those allegations and admissions and the fact that Appellee is the United States of America gave the lower Court jurisdiction in the premises under the statute mentioned.

The jurisdiction of this Court is based on United States Codes Title 28, Section 225, which provides

that the Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal final decisions of the District Courts.

STATEMENT OF THE CASE.

This action is one in which United States of America seeks to recover damages for the alleged breach of a construction contract made with one John V. Grogan, as the contractor, for the erection of certain buildings at the United States Inspection Station at Babb-Piegan in Glacier County, State of Montana. While John V. Grogan was made a party to the action in the Court below, he was not served with process and did not appear. The American Surety Company, a corporation whose true name is American Surety Company of New York (Tr. 30), wrote the bond to secure the performance of the said construction contract. It was named as a defendant in this action, was served with process, alone defended the action, and now takes the appeal herein to this Court from the judgment rendered against it in the lower Court.

The action was tried to the Court, without a jury, which made its findings of fact and conclusions of law (Tr. 76 to 81) in favor of Appellee and upon which judgment was entered April 27, 1942 (Tr. 82 to 84), against Appellant in the amount of \$14,400.19, being \$11,919.04 damages and \$2481.15 interest on that sum, together with costs of \$33.20. Appeal was duly taken therefrom to this Court (Tr. 84 and 85) upon July 21, 1942.

Appellant contended in the Court below, and does here, that there was a complete failure of proof by Appellee and that there is no evidence in the record to support the judgment from which this appeal has been taken. The further contention of the Appellant has always been, and is now, that, in any event, under the pleadings and the evidence, the Appellee is not entitled to recover \$9875.00 of the total damages awarded, or interest thereon, being the damages claimed for delay in completion at the rate of \$25.00 per day. The Appellant, at the proper time, moved to dismiss the action in the lower Court as against itself, the only defendant before the Court and the only defendant served, upon the ground that upon the facts and the law Appellee had shown no right to relief (Tr. 74 and 75). Furthermore, in connection with the contention that in no event has the Appellee the right to recover liquidated damages of \$25.00 per day, Appellant moved prior to trial to strike from the complaint (Tr. 27) all of paragraph XI thereof, relating to such liquidated damages, upon the ground that the matter pleaded therein was redundant and immaterial. All these motions were denied. Objection was also made in the lower Court to the introduction of certain evidence, and the entire record is before the Court upon this appeal, showing the evidence admitted over objection with the specific objections made thereto.

The action was tried upon the complaint, and the answer of Appellant, which latter pleading put the Appellee to its proof in the main as to the allegations of the complaint. The only evidence in the record

was introduced by Appellee. The Appellant introduced no evidence but rested its case (Tr. 75) when the lower Court denied its motion to dismiss at the close of Appellee's case in chief.

SPECIFICATION OF ERRORS.

Specification of Error No. 1.

The trial Court erred in denying Appellant's motion (Tr. 27 to 29) to strike that portion of Appellee's complaint (Par. XI, Tr. 8) relating to liquidated damages of \$25.00 per day for delay in completion of the contract involved.

Specification of Error No. 2.

The trial Court erred in admitting in evidence (Tr. 43 to 48) over Appellant's objection to the same as incompetent and irrelevant, Plaintiff's Exhibit 10, being advertisement for bids.

Specification of Error No. 3.

The trial Court erred in admitting in evidence (Tr. 48 to 66) over Appellant's objections to the same as incompetent and irrelevant, Plaintiff's Exhibit 11, being a construction contract entered into by the Government.

Specification of Error No. 4.

The trial Court erred in admitting in evidence (Tr. 66 to 72) over Appellant's objections to the same as incompetent, Plaintiff's Exhibit 12, being a public voucher and two checks.

Specification of Error No. 5.

The trial Court erred in denying Appellant's motion, made at the close of Appellee's case (Tr. 74 and 75), to dismiss the action as against the said Appellant upon the ground that upon the facts and the law the Appellee had shown no right to relief.

Specification of Error No. 6.

The trial Court erred in making and filing its findings of fact and conclusions of law (Tr. 76 to 81) in favor of the Appellee and against the Appellant, in that there is no evidence nor any sufficient evidence in the record to support the said findings or the said conclusions, or any of said findings or conclusions, and that the said conclusions are contrary to law.

Specification of Error No. 7.

The trial Court erred in rendering judgment (Tr. 82 to 84) in favor of the Appellee and against the Appellant in that there is no evidence nor any sufficient evidence to support the said judgment.

ARGUMENT OF THE CASE.

I.

THE AWARD OF DAMAGES BY THE TRIAL COURT AT THE RATE OF \$25.00 PER DAY FOR DELAY IN COMPLETION OF THE CONTRACT BY THE CONTRACTOR, GROGAN, IS CONTRARY TO THE PLAIN AND UNAMBIGUOUS TERMS OF THE CONTRACT WHICH FIXES AND LIMITS THE DAMAGES THAT MAY BE RECOVERED BY THE GOVERNMENT UPON A BREACH THEREOF.

It is alleged specifically in the complaint, and admitted in the answer, as follows, to-wit:

(a) That the time for the completion of the work by Grogan under the construction contract here involved was duly extended to June 20th, 1933;

(b) That on June 20th, 1933, Grogan had not completed the required work under the contract and had not done so on July 20th, 1934;

(c) That on the 20th day of July, 1934, the Appellee notified Grogan in writing that his right to proceed under the contract was terminated on such last mentioned date.

Then the Government took over the work and alleges that it completed the same.

The parties to the construction contract here have plainly stipulated and agreed what the damages shall be that the Appellee may recover upon Grogan's failure to complete his work as required therein. That contract is Exhibit A (Tr. 9 to 24), annexed to the complaint, and Article 9 of the contract (Tr. 15 to 17) contains the stipulation and agreement of the

parties with respect to damages payable to the Government upon Grogan's default. To paraphrase that Article it provides that the damages payable by Grogan upon default shall be "excess cost" to the Government *if it terminates the contract* and takes over the work and completes it, but that he shall pay liquidated damages of \$25.00 per day until the work is completed or accepted *if the Government does not terminate the contract* for default. In other words, the Government is given alternative rights in the premises. The election by the Government to exercise one right prohibits it from exercising the other, for such is the plain effect of the contract language. To be specific, Article 9 of the contract reads as follows:

"If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article I, or any extension thereof, or fails to complete said work within such time,

(Alternative Number 1) *The Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances,*

and plant as may be on the site of the work and necessary therefor.

(Alternative Number 2) *If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof (the amount being \$25.00 per day)."*

The matter placed in parentheses is our own and for the purpose of emphasizing the point of the argument here presented to the Court, and the italics have been added by us for the same reason.

As pointed out, *supra*, it has been admitted by all concerned that the Government, by written notice to the contractor, Grogan, terminated his right to proceed with the work. This was done in July, 1934, or some thirteen months after the date in June, 1933, when the contract as extended, should have been completed by Grogan. Yet in the face of these admitted facts the Government has claimed damages under each of the above-mentioned alternatives, namely, alleged excess cost of completion and also \$25.00 per day as liquidated damages; and the lower Court, by its findings and judgment, has awarded damages of \$2044.04, as excess cost, and of \$9875.00 as liquidated

damages at the rate of \$25.00 per day for 395 days, together with interest. This item of \$9875.00 is arrived at by taking the time that elapsed between the 20th day of June, 1933, the date for the completion of the work by Grogan, and July 20th, 1934, when the contractor's right to proceed with the work was terminated by the Government, or a total of 395 days, and by multiplying that number of days by \$25.00, the amount agreed upon as liquidated damages per diem.

Under the plain language quoted, *supra*, of Article 9 of the construction contract there is no right in the Government to liquidated damages of \$25.00 per day for delay unless the Government *does not terminate* the right of the contractor to proceed. If, under the contract, the Government does terminate the right of the contractor to proceed, then, plainly, under the unambiguous language of the contract, the liquidated damage clause, fixing \$25.00 per day for each day of delay, does not become operative at all. Therefore, since the Government has terminated the right of the contractor here to proceed, the situation is precisely the same as though there had been no provision for liquidated damages of \$25.00 per day in the written construction contract. The language of the contract is plain, unambiguous and decisive in this connection and is sufficient, without more, to establish that the findings and judgment of the lower Court, insofar as they award the Government \$25.00 per day liquidated damages for 395 calendar days, or a total of \$9875.00, and interest on that sum, are wholly without support in the record.

The law is well settled that parties to a contract may stipulate what damages shall be paid upon a breach of that contract and that a stipulation of the kind is enforceable. Thus, in *Wise v. United States*, 249 U. S. 361, 63 L. Ed. 647 and 649, the Court says:

“Courts will endeavor, by a construction of the agreement which the parties have made, to ascertain what their intention was when they inserted such a stipulation for payment of a designated sum, or upon a designated basis, for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects. When that intention is clearly ascertainable from the writing, effect will be given to the provision, as freely as to any other, * * *. There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, nor why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced.”

See also in this connection *Stone, Sand & Gravel Co., et al., v. U. S.*, 234 U. S. 270, 58 L. Ed. 1308 and 1312.

Furthermore, it is a settled principle of law that where the terms of a writing, as here, are plain and unambiguous, there is no room for construction of that writing by the Courts since the only office of judicial construction is to remove doubt and uncertainty.

12 *Am. Jur.*, Contracts, Par. 229, page 752, and cases under Note 11.

In *Kihlberg v. United States*, 7 Otto 398, 24 L. Ed. 1106 and 1108, the Supreme Court of the United States said in this connection:

“The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instrument.”

And in *Green, et al. v. Biddle*, 8 Wheaton 1, 5 L. Ed. 547 and 569, the same Court said:

“Where the words of a law, treaty or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law, until a judicial construction of those instruments had been obtained.”

Yet here the trial Court has placed a construction upon Article 9 of the construction contract that is in hostility with its plain and obvious meaning. The lower Court's exposition of that contract is contrary to the express words of the instrument. The Government is bound by the contract and has thereby limited its rights now to a recovery, as damages, of excess cost only since it has terminated the contract for non-performance by the contractor and has completed the work involved. It may not be urged now under the contract and the applicable law that the Government ought to be given damages for delay at the rate of \$25.00 per day, for the Government has expressly stipulated to the contrary in its own con-

tract with the contractor. Damages for delay could be recoverable now by the Government under this contract only if comprehended by the term "excess cost" in the contract; and if that term is broad enough to include damages for delay in completion, those damages of necessity would have to be pleaded specially, or certainly proven by evidence, to be so recoverable. That has not been done in the case at bar.

But apart from the foregoing general argument the decided cases by the Appellate Courts of the country, involving contract provisions identical with those in the case at bar, are unanimous in holding that the rights of the Government to recover damages under this form of construction contract are alternative rights and that the contract is binding in this respect upon the Government and limits its recovery. These Courts hold that, where the Government elects to exercise one alternative and terminates such a contract for non-performance, as it has done here, and takes over and completes the work involved, it can collect *only excess cost* from the defaulting contractor or his surety, and that the Government is then without right to exercise the other alternative and to recover liquidated damages at the contract rate specified.

The latest decision we have found that specifically announces the rule just stated is that of *United States of America v. John K. Cunningham, Receiver*, decided December 15th, 1941, and reported in 125 F. (2d) 28, this being a decision by the United States Court of Appeals for the District of Columbia.

The facts involved in the *Cunningham* case are in all essentials the same as those in the case at bar. There the United States entered into a written contract for the construction of a bridge in the City of Washington, and it is evident that Article 9 of that contract is identical with Article 9 of the contract with Grogan in the case at bar. All the decided cases show that Article 9 with which the Court must deal here is a standard form of damage clause that the Government is using in its construction contracts. The contract in the *Cunningham* case provided that the work should be completed upon July 17th, 1932, failing which the United States were authorized to take over the work and prosecute it to completion, holding the contractor for any excess cost, or the Government had the right thereunder to permit the contractor to continue the work to completion and to then collect an agreed amount of "liquidated damages". On September 12th, 1932, *nearly two months after the expiration date*, the work not then being completed, the United States terminated the contract and in the final settlement with the contractor deducted from the contract price the excess cost of the work, and also liquidated damages for delay, of \$2030.00. Suit was thereafter brought by Cunningham, the receiver for the contractor, and under the Tucker Act, to recover the liquidated damages of \$2030.00 so withheld, and other items not necessary to be considered in the argument herein. The lower Court permitted the receiver to recover the said amount of liquidated damages, and to that extent the judgment was affirmed upon appeal by the United

States Court of Appeals for the District of Columbia. In deciding the case the Court of Appeals said:

“The deduction was made under Article 9 by the terms of which the contractor was required to prosecute the work to completion within the specified time, failing which the United States were given two rights—*One*, to take over the work and complete it and to hold the contractor for any excess costs; *the other* to permit the contractor to continue the work subject to the right of the United States to retain out of the contract price liquidated damages for each calendar day of delay until the work should be completed. *We think these rights are alternative.* The article states that if the government does not terminate the right of the contractor to proceed, then the contractor shall continue the work and liquidated damages may be assessed. But in this case United States did terminate the contract and did take over and complete the work and did collect the excess cost. Having chosen this method of completing the contract, they cannot also claim the other alternative of liquidated damages. Similar provisions in government contracts have been consistently so construed by the court of claims. See particularly, *Fidelity and Casualty Company of N. Y. v. United States*, 81 Ct. Cl. 495; *Commercial Casualty Ins. Co. v. United States*, 83 Ct. Cl. 367. In the first named case the Court of Claims said:

‘The defendant elected to choose the first of these alternatives and when that decision was made the second alternative disappeared from the picture. It was thereafter mere surplusage. Upon the termination of the contract no liquidated damages could be charged to or be recoverable from the contractor.’ ”

Other cases cited and considered in the *Cunningham* case and which likewise support the contention of the Appellant in the case at bar, are as follows, to-wit:

United States v. Maryland Casualty Company,
25 F. Supp. 778; *Read*
American Employer's Ins. Co. v. U. S., 91 Ct.
Cl. 231.

It follows, therefore, upon reason, and precedent and because of contract restrictions, that the action of the trial Court in awarding liquidated damages of \$25.00 per day to the Government herein is plainly erroneous.

The foregoing argument is directed at Specification of Errors Numbered 1, 5, 6 and 7. In conclusion upon this phase of the argument we quote the following excerpt from the *Cunningham* case, supra, to-wit:

“To hold as the Government asks us in this case (the request being to allow the Government to recover not only excess cost but also liquidated damages) would be not only to disregard the plain, unambiguous language of the Government's own contract, but to make a new and different contract for the parties, and this we have already said we may not do.”

II.

THE APPELLEE HAS WHOLLY FAILED TO PROVE ALLEGATIONS OF ITS COMPLAINT ESSENTIAL TO THE CAUSE OF ACTION DECLARED UPON THEREIN, AND THERE IS NO EVIDENCE NOR ANY SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE FINDINGS AND CONCLUSIONS OF THE LOWER COURT OR THE JUDGMENT ENTERED THEREON AS TO THE DAMAGE ITEM OF \$2044.04.

Under this heading of the argument the Appellant contends, substantially, that, apart from the damage item of \$9875.00, awarded by the lower Court as damages for the delay of 395 calendar days in completing the contract, there is a complete failure of proof on the part of the Appellee with respect to the other item of damages awarded by the lower Court, of \$2044.04.

The finding of the lower Court as to this last mentioned item (Tr. 79 and 80) is that because of the failure of Grogan to perform his contract the Plaintiff was required to and did necessarily lay out and expend the sum of \$2044.04 more in causing the work to be done and in completing the said contract than it would have been required to lay out and expend had Grogan duly performed his contract and completed the work as he had promised and agreed to do. This finding, by plain inference and as a necessary consequence of the language of the trial Court, declares that it cost the Government the sum mentioned to complete the Grogan contract in accordance with the plans, specifications, etc. of that contract.

Furthermore, as established by previous argument herein, the Government must justify its claim for

damages in the case at bar under Article 9 of the Grogan contract, and bring that claim, by proof, within the provisions of that article of the contract. That article provides, in substance, that, when the Government takes over the work after default and after termination of the right of the contractor to proceed, the Government shall prosecute *that work* to completion, namely, the work provided for by the Grogan contract and the plans and specifications for the same, and that the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. This contract provision means just what it says, namely, that *the work* shall be completed—the work comprehended by the Grogan contract—which, of necessity, must be pursuant to the plans, specifications, drawings, etc. of the Grogan contract, and not otherwise.

All of the foregoing leads to the conclusion that, under the plain terms of the contract, the Government had the burden herein of establishing that the work it had done, by separate contract, after the termination of the Grogan contract, was merely a continuation to completion of the work provided for by the Grogan contract. It had the burden of proving that the excess cost incurred by it in that connection was the cost of making the unperformed work conform to the Grogan contract. Apart from the contract terms in this connection, which are wholly plain, the law is well settled generally that, in cases of defective performance of building contracts, the general measure of damages

is the reasonable cost of making the work conform to the original contract.

9 *Am. Jur.*, Building and Construction Contracts, Par. 152;

Stillwell & Bierce Mfg. Co. v. Phelps, 130 U. S. 520, 32 L. Ed. 1035;

15 *Am. Jur.*, Damages, Par. 46;

9 *C. J.*, Building and Construction Contracts, Par. 153;

27 *Amer. & Eng. Ann. Cases* (Ann. Cas. 1913B), page 781 (Note);

38 *A. L. R.* 1383;

Sutherland on Damages, 4th Edition, Vol. 3, Par. 699.

To restate the principle upon which the Appellant stands in this connection, the burden was upon the Government at the time of trial to establish by way of foundation for its alleged "excess cost" items that the contract it made for completion (a) covered only the unperformed work under the Grogan contract, and (b) provided that it should be done and completed in accordance with the plans, specifications, drawings, etc. of the Grogan contract. Otherwise evidence of cost would be incompetent. Furthermore, payments made by the Government to Government construction engineers neither would nor could be competent without proof that the work such men did was reasonably necessary to complete the Grogan contract in accordance with the plans, specifications, drawings, etc. of that contract. Yet we contend that there is no such foundation evidence in this record and

that the record is barren of any showing by the Government, or otherwise, that the payments made by it under its so-called completion contract or to Government engineers and others for supervision, inspection, etc., were reasonably or otherwise necessary to complete the Grogan contract and the work thereunder. The record herein establishes no more than the following facts for the Government with respect to alleged "excess cost", to-wit:

(1) That a contract was made by the Government with McGinnis & Lancaster (Tr. 49 to 66), which contract recites that it is "for completion of the construction of the Inspection Station at Babb-Piegan, Montana," (Tr. 50) for a consideration of \$4280.00, and "in strict accordance with the specifications, schedules, and drawings, * * * and designated as follows: Specification for completion of construction of the United States Inspection Station at Babb-Piegan, Montana, dated May 22, 1934;" (Tr. 50)

(2) That under that contract an amount of \$3781.00 was paid to McGinnis and Lancaster; (Tr. 73)

(3) That J. B. Lavine, a construction engineer, was paid \$2137.54; (Tr. 73)

(4) That \$414.00 was paid to various Government engineers in salaries, expenses, etc. (Tr. 74)

It is a far cry indeed from proof of the foregoing facts to the proof required, under the law, to establish liability upon the part of the Appellant for any cost items whatever.

There is no proof whatever in the record that the McGinnis and Lancaster contract was to complete the inspection station at Babb-Piegan, Montana, *in accordance with the specifications, plans and drawings of the Grogan contract*. On the contrary it appears that a different set of specifications, at least different in date, was used as a basis for the McGinnis and Lancaster contract. If by any chance the specifications of the two contracts were the same, there is no proof whatever to that effect. Neither is there any proof whatever in the record that the monies paid to Lavine, construction engineer, and to the other engineers, were paid in connection with the completion of the Babb-Piegan station *in accordance with the specifications, drawings, etc. of the Grogan contract* or that the payments to Lavine and the other engineers were made because reasonably necessary in connection with the completion of that station.

The theory of the complaint here, as of course would have to be the case under the applicable law, is that the Government completed the work that Grogan obligated himself to do and did so pursuant to the requirements of the Grogan contract, thereby incurring excess cost which is computed as follows, to-wit:

Payments under contract for completion (the one let to McGinnis and Lancaster)	\$ 3,781.00
Payments to J. V. Lavine, construction engineer for the Government.....	2,137.54
Payments to various engineers for salary and expenses	414.00
Total of payments to Grogan.....	49,602.50
<hr/>	
TOTAL.....	\$55,935.04
Deducting therefrom (Par. VI of the complaint) the amount Grogan was to receive	53,891.00
<hr/>	
Leaves a balance of.....	\$ 2,044.04
as excess cost.	

Under the record herein the theory of the complaint is still but theory only. None of the alleged cost items is recoverable by the Government for the reason that there is no evidence in the record establishing or even tending to establish that they, or any of them, were incurred or expended to complete the inspection station at Babb-Piegan, Montana, *in accordance with the Grogan contract and its plans, specifications, drawings, etc.*

From the foregoing it is evident that specification of errors numbered 2, 3 and 4 are well taken. The Appellant properly objected to the introduction in evidence of the McGinnis and Lancaster contract, and to the advertisement for bids, as incompetent because no foundation for the introduction of such evidence had been laid. All of that evidence was incompetent because the Government did not show

that the McGinnis and Lancaster contract was but a continuation of the Grogan contract (if such is in fact the case) and that the specifications for the two contracts are the same as to the work left undone by Grogan. For the same reason evidence of payments under the McGinnis and Lancaster contract was incompetent and was properly so objected to by the Appellant.

As to the payment to engineers for salaries and expenses, it was conceded only, at the time of trial, by the Appellant that payment of the sums of \$2137.54 and \$414.00 was made (Tr. 73 and 74). In making that admission the Appellant admitted only the fact of payment and there is nothing whatever in the record to show that these sums were reasonably necessary to be paid to complete the Grogan contract.

The foregoing necessarily leads to the further conclusion that specification of errors numbered 5, 6 and 7 were properly assigned in that, upon the facts and the law, the Appellee has shown no right to relief as to the item of \$2044.04. The findings of fact and conclusions of law of the trial Court as to that item are unsupported by any sufficient evidence and the judgment, too, is without support in the record.

CONCLUSION.

Under this record there is no basis in law for the award to the Government of liquidated damages of \$25.00 per day and no basis in fact for allowing the Government to recover alleged "excess cost". The

motion of Appellant at the close of Appellee's case in chief (Tr. 74 and 75) to dismiss the action, upon the ground that upon the facts and the law the Appellee had shown no right to relief was, accordingly, proper under the provisions of Rule 41(b) of the Rules of Civil Procedure for the District Courts of the United States, and that motion should have been granted. The lower Court erred in denying that motion as it did in making its findings and conclusions for Appellee and in rendering judgment accordingly. There is no support in the record for the findings, conclusions and judgment since the Government plainly has shown no legal right to liquidated damages for delay and has wholly failed to establish by any competent evidence that it completed the Grogan contract and incurred "excess cost".

The record further shows that the Court has allowed interest from November 1st, 1937, on the liquidated damages award of \$9875.00 and on the other item of allowed damages of \$2044.04. This interest item at the time the judgment was entered (Tr. 83 and 84) amounted to \$2481.15. The basis for the allowance of interest from November 1st, 1937, is found in the allegation of the **complaint** (Tr. 8) that the Government then made its demand upon Grogan and the Appellant to pay. Yet in spite of the fact that the demand was made upon November 1st, 1937, as admitted in the answer (Tr. 32), this action to recover the damages demanded was not filed until nearly three years later, to-wit: upon August 5th, 1940 (Tr. 26). Therefore, on the principle of *U. S. v. Sanborn*, 135 U. S. 271, 34 L. Ed. 112, the Government should not be allowed in

any event to recover interest on damages herein. Not only did the Government long delay an assertion of its claimed rights, without showing any reason or excuse for the delay, but it nowhere appears of record that the Appellant has in anywise profited by not having heretofore met the Government's demand.

For all of the reasons urged in this brief the judgment appealed from herein should be reversed with directions to the lower Court to enter its judgment dismissing the action as against the Appellant.

Dated, Billings, Montana,
October 30, 1942.

STERLING M. WOOD,
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Attorneys for Appellant.

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United States
Circuit Court of Appeals
For the Ninth Circuit

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a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES
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Appellant,

vs.

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Appellee.

On Appeal from the United States District Court
for the District of Montana

BRIEF FOR THE APPELLEE

STATEMENT

This is an appeal by the American Surety Company, the only defendant below on whom service was effected, from the judgment entered against it by the Honorable Charles N. Pray, Judge of the United States District Court for the District of Montana, in a case tried to the Court without a jury. The opinion of the Court below is reported sub nom. *United States v. Grogan*, in 44 F. Supp. 871. Previous proceedings are reported in 39 F.

Supp. 819. The position of the parties is reversed from what it was below and hereafter in this brief defendant John V. Grogan will be referred to as the "contractor," defendant American Surety Company as the "appellant," and plaintiff as the government or the "appellee."

The action was brought to recover damages occasioned the United States by the failure of the contractor and his surety, appellant herein, to perform the terms of a written contract on U. S. Standard Form No. 23, Revised (Title 41, Code of Federal Regulations, sec. 12.23), between the contractor and the government, whereby the contractor agreed within a specified time to complete the construction of a certain building at Babb-Piegan, Montana, to be used as a United States Inspection Station, or to pay to the United States, as damages for his failure so to do, certain sums to be computed according to the provisions of the contract.

The Court below determined the disputed matters in favor of the United States in a written opinion disposing of the questions of law and entered findings of fact and conclusions of law holding the United States entitled under the contract provisions to recover the sum of \$9,875 as liquidated damages for the delay of 395 calendar days in completing the contract, and the further sum of \$2,044.04 as the additional cost sustained in completing the building by reason of the failure of the contractor and appellant, his surety to do so (R. 81). The Court accordingly gave judgment against appellant for these amounts with interest (R. 82) and this appeal was prosecuted (R. 84).

Appellant does not deny that the contractor had been delayed 473 days in the performance of the contract, that, accordingly, at his request and with appellant's consent the time for completion was extended to June 20, 1933, that when June 20 arrived the government elected to allow the contractor to continue with the work without any objection from appellant and it was not until thirteen months later on July 20, 1934, that the contractor's right to proceed was terminated.

It is equally conceded by appellant that the contractor and the appellant breached the contract with reference to the completion of the building on the terms agreed. It is believed that all the essential allegations of fact in the complaint, except as regards the amount of damages, are admitted either by the answer filed or by express admissions at the trial. Appellant's denials and assignments of error go only to the amount of damages the government may recover and not to the fact that the government was damaged.

APPELLANT'S CONTENTIONS

Appellant's brief urges only two main contentions; *first*, that the parties themselves had agreed as to the measure of damages in case of a breach in the obligation to complete the work, but the court applied a measure of damages different from that agreed upon when it permitted recovery of liquidated delay damages in addition to excess costs; and, *second*, that the parties themselves had limited the government's recovery to excess cost only and there was a failure on the part of the government to prove by competent evidence that there was any excess cost for completing the building, or the amount thereof.

Appellant does not appear to deny federal law is exclusively applicable¹ and that under the law of the United States the parties could provide for liquidated delay damages in the contract. It could not well do so in view of the statutory provision requiring the provision (40 U. S. C. 269) and the applicable decisions of the Supreme Court. *Sun Printing and Publishing Association v. Moore*, 183 U. S. 642; *Wise v. United States*, 249 U. S. 361; *J. E. Hathaway and Co. v. United*

1. The Court below expressly held in denying appellant's motion to strike. *United States v. Grogan*, 39 F. Supp. 819, 820. To the same effect see *Erie R. R. Co. v. Tompkins* (1938), 304 U. S. 64, 78; *United States v. National Surety Co.* (1940), 309 U. S. 165, 169; concurring opinion of Jackson, J., in *D'Oench, Duhme and Co. v. F. D. I. C.* (1942), 315 U. S. 447, 468-472; *United States v. Clearfield Trust Co.* (1942, C. C. A. 3), 130 F. (2d) 93, 94; *Kemp v. United States* (1941, D. C. Md.), 38 F. Supp. 568, 571. Compare *Byron Jackson v. United States* (1940, S. D. Calif.), 35 F. Supp. 665, 667-668; *Cox v. United States* (1832), 6 Pet. 172, 203; *Duncan v. United States* (1833), 7 Pet. 435, 449.

States, 249 U. S. 460. Appellant likewise appears to admit that it is lawful for parties freely to contract as to the measure and proof of the damages to be recovered in the event of a breach of the principal obligation of the contract and that such is the law is established by the decision of this Court. *United States v. Harris*, 100 F. (2d) 268, 278. Finally, it is not believed that appellant seeks to deny that where the law of the United States is applicable the parties may by apt language provide for the recovery of both excess cost and liquidated delay damages. *Southern Pacific Co. v. Globe Indemnity Co.* (C. C. A. 2), 21 F. (2d) 288, 291, further pro. 30 F. (2d) 580, cert. den. 279 U. S. 860; *Six Companies v. Joint Highway District* (C. C. A. 9), 110 F. (2d) 625, rev. on other grounds 311 U. S. 180, 187; *Reading v. United States Fidelity and Guaranty Co.* (E. D. Pa.) 19 F. Supp. 350.

It thus appears appellant's first main contention is simply a complaint that the Court below incorrectly construed and applied the language of Article 9 to the situation of fact presented by the case at bar. The government, on the other hand, maintains the construction adopted by the Court below is the only natural and correct one while that urged by appellant does not adequately deal with the different situations which may be presented and is unworkable in practice.

Appellant's second main contention is that the government was limited by the terms of the contract to the recovery of excess cost, but that as a condition of doing so it must affirmatively show its expenditures were rea-

sonable and must negative any possibility that the work under the completion contract differed in any particular from that of the defaulted contract. Appellant does not appear, however, to be seeking to deny that the government's expenditures were reasonable. It could not well do so since the completion contract was awarded to the low bidder in accordance with appellant's own request and the applicable statutes and regulations.

It accordingly seems appellant's second main contention is confined to the objection that the Court below should have required the government to establish by affirmative evidence, as part of its case in chief, that the work under the completion contract differed in absolutely no particular from the work not performed under the defaulted contract. The government, on the other hand, maintains the burden is on appellant to establish any deviations from the work specified under the original contract once the government has shown the completion contract was deemed and intended by the contracting officer to be for completing the work not performed under the defaulted contract.

ARGUMENT

I

Liquidated delay damages at the contract rate for the period from the completion date of the contract to the date the contractor's right to proceed was terminated were correctly allowed by the Trial Court.

Appellant challenges as erroneous, however, the construction which the district court placed upon the contract provisions concerning damages. It is common ground to appellant and appellee alike that the contract is plain and unambiguous leaving no room for interpretation and that accordingly the only duty of the court below was to enforce the contract by applying its provisions to the facts. Appellant and the government do not, however, agree on the meaning of the contract in the situation involved in the case at bar.

It does not necessarily follow, of course, because the parties cannot agree upon the proper construction to be given the terms of the contract that it is not plain or must be ambiguous. *Andrew v. St. Louis Joint Stock Land Bank*, (C. C. A. 8) 107 F. (2d) 462, 468. The Court in the enforcement of a contract of necessity must determine the meaning of the parties and by its enforcement give effect to their intent, but to carry that intent to its culmination the intent must, as this Court held, be determined from the language and the purpose of

the parties in making the agreement. *First Seattle Dexter Horton National Bank v. Commissioner of Internal Revenue*, 77 F. (2d) 45, 48. Such is the principal problem presented on this appeal.

In determining the intent, it is necessary to take the contract by its four corners, read all of it, giving effect to all its parts, and consider the object of the entire contract, the purpose of the particular clause, and the circumstances of the parties at the moment of entering into it. The contract, executed on U. S. Standard Form No. 23, Revised (Title 41, Code of Federal Regulations, Sec. 12.23), is found at page 9 of the record. Upon reading it, it is plain that its object was the construction of a building at the United States Inspection Station, Babb-Piegan, Montana, within a time certain specified in the contract for a price therein specified. It further appears that at the time of making the contract the parties contemplated the possibility of default by the contractor through not completing the construction of the building within the time stated in Article 1 (R. 10) or even at a later date. In the exercise of ordinary prudence and in accordance with the statutory requirement (40 U. S. C. 269) they therefore included in the contract Article 9 (R. 15) imposing certain rights, obligations, and liabilities in case of the contractor's failure to complete, on the meaning of which article the instant case turns.

Article 9 falls into two separate and distinct parts, the first part defining the measure of damages in the event the government elects to terminate the contractor's

rights for failure to make proper progress or to complete the construction of the building within the time specified by Article 1, the second part imposing on the contractor the obligation of continuing the work and of paying liquidated delay damages for the delay until the work is completed in the event the government elects not to exercise its right of termination for failure to complete within the specified time. It is thus obvious that both parts of Article 9 together are intended to cover the three distinct situations: (1) Where before the date for completion the government elects to terminate the contractor's right to proceed and takes over the work itself or by a completing contractor; (2) where the government elects to allow the contractor to continue with the work after the date specified for completion and the contractor finishes the work late; and (3) where the government elects to allow the contractor to continue with the work after the date specified for completion but the contractor fails to finish the work even at a later date than that specified in the contract.

It is common ground to appellant and the government that the construction work called for by the contract was not completed by June 20, 1933, the time specified by Article 1; that when the time specified arrived the government elected not to terminate the contractor's right to proceed but permitted the contractor to continue with the work, and that, the contractor and appellant his surety not having completed the work for thirteen months thereafter, on July 20, 1934, the government was compelled to take over and complete the

work by another contractor. It must therefore be conceded that the situation presented on this appeal is that described in (3) above.

Appellant's position in this respect is that the two clauses of Article 9 furnish only two rules to apply although there are three distinct situations with which the parties were obliged to deal in contracting. Appellant contends that Article 9 deals with the measure of damages to be recovered under the contract exclusively and that the government has only a right of election between two alternative measures of its damages, (a) general damages for its actual loss, in the form of the excess cost of completing the work, or (b) special damages for the inconvenience to the public service by the delay, in the form of liquidated damages at the rate specified. Appellant appears to deny that the article imposes an obligation on the contractor of continuing the work to completion in the event that the government elects to allow him to proceed after the date specified in Article 1, and that for the breach of this additional obligation the government may recover its actual damages without forfeiting its right to the liquidated delay damages. The government maintains that appellant is confused as to the effect of the article and its full scope, intent and purpose, and that the meaning of the language is obvious once the situations involved are understood. The government admits that the few reported cases on the point are inconsistent with each other, but maintains that the clearer, more cogently reasoned decisions are in accord with that of the court below.

1. *The language of the article, examined in the light of the situations with which its draftsmen dealt, supports the action of the Court below in holding the Government entitled to liquidated delay damages as well as the additional cost of completing the work.*—To understand the meaning of the language of Article 9 of the U. S. Standard Form construction contract, it is only necessary to review the law and statutes applicable to the three obvious and distinct situations for which the draftsman was required to provide.

The general principles of law applicable are elementary. Where a contractor fails to perform the work within the time specified or a reasonable time thereafter, the owner or purchaser may recover both general damages for the value of his bargain and special damages for consequential losses, the probability of which the contractor should reasonably have known.² In the case of a defaulted construction contract this means the cost to the owner of completing the work and the monetary value of the use of the construction from the date it should have been completed to the date it was actually finished.³ However, in the event the owner, claiming want of proper progress by the contractor, takes over the work before the specified completion date, the contractor is not

2. The most familiar form of the principle is the rule in **Hadley v. Baxendale**, 9 Ex. 341, that in cases involving sale of goods, in the absence of a special contract provision, plaintiff must prove both the consequential damage and the fact that defendant knew or should have known of its possibility.

3. See 3 Sutherland, **Damages** (1916), pp. 2592-2596, and secs. 702-704; **McMullen v. United States**, 222 U. S. 460, 471.

liable for damages of any kind whatever.⁴

Besides taking into account these common law principles, the draftsman was moreover required by the act of June 6, 1902, c. 1036, Sec. 21, 32 Stat. 326 (40 U. S. C. 269), to insert in the contract a stipulation for liquidated damages for delay in addition to the actual damages sustained by the government in completing the work.⁵

In view of these legal circumstances the contract provisions required of the draftsman seem fairly obvious.

4. See *Stone and Gravel Company v. United States*, 234 U. S. 270, 277-280; *United States v. O'Brien*, 220 U. S. 321, 327.

5. The statute as proposed by the Treasury Department and enacted without any debate by the Congress provides: "In all contracts entered into with the United States for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay; and the Secretary of the Treasury is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable; and in all suits commenced on any such contracts or any bonds given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties." The letter of the Secretary of the Treasury dated February 3, 1903, transmitting the proposed legislation to the House Committee on Public Buildings and Grounds (House Report No. 1794, 57th Cong., 1st Sess., vol. 4405 reprinted House Debates, April 29, 1902, 35 Cong. Rec. 4835) stated: "When contracts are awarded for the construction or repair of public buildings under the control of this Department it sometimes happens that, having a due regard for the convenience of the Government, the moving consideration for the acceptance of a particular bid is the time within which the bidder agrees to complete the work embraced in his bid, and where, under those circumstances, the Government buys time, so to speak, and lets work to a bidder based on the consideration of time being of the essence of the contract, it is unjust to the United States and unfair to competing bidders to say that recovery shall be had for no more than the actual damages sustained by the United States and that the element of inconvenience to the public and the Government in being deprived of the use of the public building shall not be considered. The attitude of the courts in favor of construing as penalties wherever possible all stipulations for liquidated damages is founded upon principles which in the main are humane and just, but it results in rendering possible, under certain circumstances, the most vexatious delays, with no other remedy, on the part of the Department, than the abrogation of the contract and the letting of the same, a method in itself always attended with more or less delay."

As indicated before, three distinct situations of fact must be provided for: (1) where before the completion date the government takes over the work, (2) where the contractor is permitted to finish late, and (3) where the contractor although permitted to continue after the completion date fails to finish within a reasonable time and the government is obliged to finish the work itself.

To provide for the case where before the specified completion date the government desires to take the work out of the contractor's hands because of his failure to make proper progress, *the first situation*, the draftsman of the Standard Form contract was obliged to exclude the operation of the common law rule releasing the contractor and his sureties from liability for the cost of completing the work. The draftsman accordingly prescribed in the first part of Article 9, that:

If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his surety shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. (Italics supplied.)

To provide for the cases where the contractor is permitted to continue after the specified the completion date, and either, *the second situation*, finishes after a delay, or, *the third situation*, fails to finish within a reasonable time so that the government is compelled to take over and complete the work, the draftsman of the Standard Form was required to give effect to 40 U. S. C. 269 and include a stipulation for liquidated delay damages but could rely on the common law rule that the contractor allowed to continue but failing to finish is liable for the actual cost of completing the work. The draftsman accordingly prescribed in the second part of Article 9, that:

If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the government as fixed, agreed and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications, or accompanying papers and the contractor and his sureties shall be liable for the amount thereof; . . . (Italics supplied.)

Under the provisions of these two parts of Article 9, if the contractor fails to complete the work within the time specified, the government must elect to do one of two things: it may by written notice terminate the contractor's rights to proceed further with the work and claim the rights conferred by the first part of the article,

but it must do it at once at the time of the original breach and before the specified completion date. It may instead, on the other hand, allow him to continue with the work, but if it does so it loses the rights given by the first part of the article and takes only those conferred by the second part. The government has the right to elect which of the two courses it will follow and its choice is not dependent upon the rights or desires of the contractor or his surety in any respect whatsoever. It lies completely with the government, but it may be exercised only once and after the specified date for completion, the government may not claim the rights under the first part, but is confined to the recovery of the stipulated liquidated delay damages and the right implied by the common law to have the building finished within a reasonable time. The effect of the two provisions in the three situations may accordingly be succinctly stated.

(1) *Where before the completion date the government takes over the work.*—If the government by written notice terminates the contractor's right to proceed, it may cause the work to be completed either by reletting the contract or by doing the job itself. It may, without compensation to the contractor, take possession of and utilize in completing the work all materials, appliances, and plant which the contractor may have at the site of the work and, in addition, may recover from the contractor and his surety the amount of any additional cost in completing the work.

(2) *Where the contractor is permitted to continue and finishes late.*—The article's second part, previously dormant in the contract, comes into operation by the government's election to allow the contractor to continue after the specified completion date. By its choice the government obtains the contractor's obligation to continue the work, to pay liquidated damages for the delay in completion, and, impliedly, to complete it within a reasonable time. The government forever forfeits, however, its rights under Article 1, to have the work completed by a particular date, and those it might have exercised under the first part of Article 9.

(3) *Where the contractor permitted to continue fails to finish the work.*—By the government's election to allow the contractor to continue after the completion date, its rights under Article 1 and the first part of Article 9 disappears forever from the contract. It is no longer entitled to have the work completed by the date specified, nor to terminate the contractor's right for mere failure to show sufficient progress and take over the work together with all materials and equipment and complete performance at the contractor's expense. The government obtains instead, however, the new rights conferred by the coming into force of the second part of Article 9. It may recover stipulated liquidated damages for the delay, and the contractor is under obligation to continue work. Since no particular time is specified, the law implies that the work will be completed within a reasonable time.

Crossland v. Kentucky Bluegrass Co., (C. C. A. 6), 103 F. (2d) 565, 567;

American Concrete Steel Co. v. Hart (C. C. A. 2), 285 Fed. 322, 327;

Roswell Drainage District v. Dickey (C. C. A. 8), 292 Fed. 29, 32.

Since no particular measure of damages is specified for the contractor's failure to finish the work within a reasonable time, the common law gives the government the right to recover the additional cost of completing the work (see, *supra*, note 3), in addition to the right to liquidate delay damages expressly stipulated for.

In the light of this analysis of the situation of fact and law for which the draftsman was providing, it is submitted that the decision of the Court below is correct in refusing to read into Article 9 the forfeiture urged by appellant. The Court's construction is in accordance with the plain and ordinary meaning of the article's language and gives effect to the common law principle that to make whole the party injured by such a default the law give both general damages in the form of any additional cost and special damages in the form of the value of the use and occupation of the building.

2. *The more cogently reasoned decisions of the federal courts supports the action of the Court below in holding the government entitled to liquidated delay damages as well as the additional cost of completing the work.*—As stated before, the contract involved is the U. S. Standard Form No. 23, Construction Contract (Title 41, Code of Federal Regulations, Sec. 12.23) used

by the government without substantial change since November 19, 1926. In all that time, however, the present question so far as is known has been before only two Circuit Courts of Appeal and only twice before the United States Court of Claims. The resulting decisions are evenly divided. The decision of the Court below is in accordance with the decision of the Court of Appeals for the Fifth Circuit and of the first decision on the subject of the United States Court of Claims. The contention of appellant herein is in accordance with a decision of the Court of Appeals for the District of Columbia and of a later decision by the United States Court of Claims in which the Court was divided three judges to two. In view of this conflict of authority, it would appear clearly the right and duty of this Court to determine the question for itself.

The contention of appellant in the instant case that terminating the contract extinguishes the right to liquidated delay damages and confines the government to recovery of excess cost alone was first made in *American Employers' Insurance Co. v. United States* (1940), 91 Ct. Cls. 231, 238. There the contractor was required to complete certain units of the work by January 19, 1933, and the entire contract by April 19, 1933. The first units were completed twenty-eight days late but were accepted February 16, 1933, or before the contractor stopped work on February 24, 1933, as well as before the date his right to proceed was terminated. The right to proceed was terminated March 7, 1933, or forty-three days prior to April 19, 1933, the date for

completion of the entire contract. The amount originally deducted by the contracting officer for liquidated delay damages on that part of the work taken out of the contractor's hands before the completion date was remitted by the government in accordance with the established rule,⁶ but when the contractor sued in the Court of Claims, the government set up a counterclaim for that amount of the liquidated delay damages which had accrued for the twenty-eight days' delay in completing the first units of work. The Court of Claims adopted the government's contentions, saying (p. 239):

"In the case now before us the assessment of liquidated damages for the failure to complete the first unit was within the terms of the contract and was due when plaintiff undertook to complete the contract work.

"The liquidated damage clause disappears from the contract after the contract was cancelled by the government, not before."

Thus in the first case involving the situation where the government elects to allow the contractor to continue with the work after the date specified for completion but later is obliged to take over and complete the job its right to recover both liquidated delay damages and excess cost was sustained.

The question was next presented to the Court of Appeals for the Fifth Circuit in *Continental Casualty Co. v. United States*, 113 F. (2d) 284. In that case the

6. *Stone & Gravel Co. v. United States*, 234 U. S. 270, 277-280; *Fidelity & Casualty Co. v. United States*, 81 Ct. Cls. 495; *Commercial Casualty Ins. Co. v. United States*, 83 Ct. Cls. 367.

district court entered judgment against the surety for liquidated delay damages and excess cost exactly as the Court below did in the instant case. The question was discussed by counsel on the argument in the district court, but the contention made by appellant in the instant case was not forcibly insisted upon and the district court in its opinion (*United States v. Continental Casualty Co.* (1939, E. D. La.), 29 F. Supp. 598, 601), confined itself to saying:

“Under the terms of Article 9 of the contract and paragraph 3 of the specifications, liquidated damages at the rate of \$20.00 per day on each item are chargeable against the original contract from the day following the nominal date of completion to and including the date of default or termination of the contract.

“The uncontroverted evidence adduced at the trial shows that the cost of readvertising and reletting the work and the excess cost for job overhead, area, division and district overhead in the amounts claimed by the government constitute an item of damage actually sustained by the government.”

The district court accordingly declared that the amount of the excess cost and the liquidated delay damages due the United States were as stated in the complaint and that the defendant had not offered any evidence to show that the work could have been done at a cheaper price. It continued:

“On default of the Grasser Contracting Co. the rights of the United States and the liability of the Continental Casualty Co. became fixed. (Citing

cases.) The action of the contracting officer in terminating the right of the Grasser Contracting Company to proceed with the work was not a cancellation or annulment of the contract."

On appeal the surety company, as appellant, did not contend that the provisions of Article 9 prevented recovery of both excess cost and liquidated delay damages as is urged by appellant in the instant case. Instead it was argued that the government acted unreasonably in failing to terminate the contract at the date fixed for completion and allowing the contractor to continue with the work although he failed to make reasonable progress. The action of the district court was affirmed by the Fifth Circuit Court of Appeals, the Court saying at pp. 285-286:

The government filed this suit to recover such excess from the surety, together with the sum of \$620.00 as liquidated damages under the contract for the delay in completion of the work beyond the contract date down to the date of the bankruptcy. * * * When the contractor defaulted in the performance of the contract by filing the petition in bankruptcy, the rights of the government and the liability of the surety under the contract immediately became fixed.

* * * * *

The fact that the government permitted the contractor to continue the work after the period for completion had expired is no reason to deny it the damages expressly provided by the contract for such an occurrence.

Thus in the second case involving the situation presented by the case now at bar, the right to both liquidated delay damages and actual additional costs was again sustained.

The question was presented for the third time in *Maryland Casualty Co. v. United States* (1941), 93 Ct. Cls. 247, 254. In that case, a court divided three judges to two held that by taking over the work the government forfeited its right to liquidated delay damages even though they were already accrued and vested. The three majority judges cited cases holding that in the situation, where the contractor was prevented from completing the work by termination before the specified completion date, liquidated delay damages cannot be recovered (see *supra*, note 6) and declared the Court's own previous decision in the *American Employers' Insurance Co.* case, *supra*, involving the identical situation, was distinguishable in that the several units of the work constituted separable parts of a divisible contract. They also sought support in *United States v. Maryland Casualty Co.* (D. C. Me.), 25 F. Supp. 778, a case decided under an entirely different form of contract.⁷ The other two judges, however, rejected the decision of the three majority judges in separate dissenting opinions. The minority accepted the government's contention adopted by the Fifth Circuit and the Court of Claims own decision in the *American Employers' Insurance Co.* case that termination after the specified completion date operated to exclude further liquidated delay damages, but did not forfeit the vested right to delay damages which

had accrued between the completion date and the termination.

Judge Whitaker conceded that the right to liquidated delay damages and to excess cost were alternative but denied that a termination after the specified completion date acted retroactively to forfeit liquidated delay damages already accrued. Said Judge Whitaker (pp. 256-257):

When the plaintiff in the case at bar failed to complete his contract on time the defendant chose to allow him to continue the work. In such event, the contract expressly provides that the contractor shall become liable to the defendant for damages for the delay in a stipulated sum per day. His failure to complete the work on time was a continuing default until the work was actually completed. This default continued for ninety-one days, whereupon, the defendant availed itself of the other remedy provided for, to wit, terminating the contractor's right to proceed further and then taking over the work itself.

Upon the termination of the contract the pro-

7. In view of the reliance placed upon the district court case by both the majority of the Court of Claims and the Court of Appeals for the District of Columbia in the Cunningham case, it must be pointed out that it was not a case involving a contract for construction nor was the U. S. Standard Form No. 23, involved in all the other decision, employed. The contract was for the removal of a sunken barge from tidewater and towing it out to sea to be sunk in deep water. The government sustained no conceivable damage as a result of the delay except the actual cost of reletting the contract, plus expenses for inspection, superintendence, etc., payment of which were expressly provided for in both the article relating to delay damages and that relating to total failure of performance. The citations of the district court suggests he based his decision on the supposed rule that in no event may both liquidated delay damages and excess cost be recovered. (See *Six Companies v. Highway District*, 311 U. S. 180, 187, holding such is the California law and reversing the decision of this Court, 110 F. (2d) 620.) As it appeared that in the circumstances of the case the so-called liquidated delay damages were in fact a pure forfeiture, despite the statement in the contract that they should not be regarded as a penalty, the Solicitor General directed no appeal.

vision for liquidated damages was no longer operative under our decisions in the cases cited in the majority opinion, but until the contract was terminated, this provision was operative. We have never held to the contrary. In none of the cases cited in the majority opinion was the contractor permitted to proceed beyond the limit of the contract period; hence, the provision for liquidated damages never became operative. But in this case it did become operative. It becomes inoperative only upon the date that the defendant cancels the contract.

It is my opinion, therefore, that the defendant is entitled to collect the stipulated damages from the expiration of the contract period to the date of termination and, in addition, is entitled to collect the excess cost incurred incident to its completion of the work.

Judge Madden, however, was unwilling to regard the right to liquidated delay damages and the right to excess cost as in any sense alternative. He appears to have been impressed with the fundamental common law distinction between general damages for the loss of the benefit of the contract and special damages for the loss suffered as a result of not obtaining the work on time. Said Judge Madden (p. 257):

The provision of the contract for liquidated damages for delay, and the other provision for recovery of excess costs if the work is completed by the government, are not alternative provisions and are not aimed at the same default on the contractor's part. If the contractor completes the work late, the government gets the structure at exactly the contract price. But it has been denied the use of the structure for the period of the delay and hence gets the

liquidated damages as compensation, the actual damages being agreed as being "impossible to determine." The government has suffered no addition to the contract price, but that does not prevent it from obtaining compensation for the default that has occurred, viz., the delay.

He then explained the reason which he believed had led the parties to exclude liquidated delay damages for the period following the termination of the contract and referring to the action of the majority in reading into the contract a provision for forfeiture declared: "I see no reason for reading into the contract a provision which is not there, when the ends served by such interpolation are neither equitable nor otherwise desirable."

The last decision on the question is that of the Court of Appeals for the District of Columbia in *United States v. Cunningham*, 125 F. (2d) 28, 31, upon which the appellant in the instant case principally relies. So far as the question principally involved on the present appeal is concerned, the situation of fact presented in the *Cunningham* case is on all fours. When the date specified for completion arrived the government did not terminate the contractor's right to proceed, but allowed him to continue for nearly two months thereafter when, the contractor having failed to make any substantial further progress, the government was compelled to take over the work. The Court of Appeals followed the same reasoning as the Court of Claims majority in the *Maryland Casualty* case and declared that Article 9 gave the United States an election between two rights which were

not only alternative but exclusive. It did not cite that case, but instead cited *Fidelity and Casualty Co. v. United States* 81 Ct. Cls. 495 and *Commercial Casualty Insurance Co. v. United States*, 83 Ct. Cls. 367, neither of which involved the situation where the contractor was allowed to continue after the completion date. It attempted to distinguish the *American Employers' Insurance Co.* and the *Continental Casualty Co.* cases just discussed herein and like the majority judges of the Court of Claims in the *Maryland Casualty Co.* case relied heavily on the decision of the district court in *United States v. Maryland Casualty Co.*, 25 F. Supp. 778, 780 (*supra*, note 7). The Court ignored the difference between cases of termination under the first part of Article 9 before the specified completion date and failure to finish although allowed to continue thereafter. It rejected without discussion the government's contention that when the contractor is allowed to proceed after the date specified he is under obligation to continue and conclude the work and that for breach of this obligation the government may recover actual damages. The Court said (p. 31):

The deduction was made under Article 9, by the terms of which the contractor was required to prosecute the work to completion within the specified time, failing which the United States was given two rights—one, to take over the work and complete it and hold the contractor for any excess cost; the other, to permit the contractor to continue the work subject to the right of the United States to retain out of the contract price liquidated damages for each calendar day of delay until the work should be completed.

Before the decision in the *Cunningham* case was handed down and before final action on the Court of Claims decision by a divided court, Judge Pray decided the motion to dismiss the government's complaint filed in the instant case in accordance with the government's contentions (39 F. Supp. 819, 821). Since the amount involved in the Court of Claims *Maryland Casualty Co.* case and the *Cunningham* case both together was only \$5,000, the Solicitor General after careful consideration determined that pending final decision of the instant case the importance of the question did not require petitioning the Supreme Court for certiorari to settle the point.

It is submitted that the more cogently reasoned opinions support the decision of the Court below in the instant case. Nothing either in the opinion of the Court of Appeals for the District of Columbia in the *Cunningham* case or in the majority opinion of the Court of Claims in the *Maryland Casualty Co.* case overcomes the clear reasoning adopted by Judge Pray in the case at bar in reaching the same conclusion as the Court of Claims minority judges, the Fifth Circuit, and the Court of Claims itself in its earlier decision in the *American Employers'* case. Neither does either opinion afford an answer to the objection of Judge Madden that the construction urged upon the court by the various surety companies requires reading into the terms of Article 9 an implied forfeiture of the government's vested right to the liquidated delay damages accrued between the specified completion date and the time the work is taken out of the contractor's hands. Indeed, as already pointed

out in this brief, such a construction involves not alone the reading into the article an implied intention to forfeit a vested right, but also ignoring the express obligation that if the contractor's right to proceed is not terminated at or before the specified completion date he will continue the work to completion within a reasonable time.

3. *Appellant's proposed construction of Article 9 fails to provide for all three of the situations in which the parties may find themselves, and is unworkable in practice.*—Appellant urges this Court to reject the construction adopted by the Court below, and by the more cogently reasoned of the other opinions on the question, and to adopt the contrary construction for what appears to be substantially the reasons given by the Court of Appeals for the District of Columbia in the *Cunningham* case. The Government submits that not only does such a construction fly in the face of the familiar rule that forfeitures will not be implied, but in addition it produces a result which is arbitrary and unworkable.

It is submitted that the construction advocated by appellant and the District of Columbia Court is based upon confusing the second and third situations which may arise through the contractor's default. It assumes that if the United States permits the contractor to proceed he must inevitably complete the work and the government will then deduct liquidated delay damages from the time of his original breach by failure to complete on time until the time he finishes the work. That this

interpretation of appellant's position is correct is confirmed by its statement at page 9 of its brief that:

Under the plain language quoted, *supra*, of Article 9 of the construction contract there is no right in the government to liquidated damages of \$25 per day for delay unless the government *does not terminate* the right of the contractor to proceed. (Appellant's italics.)

That this is equally the position of the District of Columbia Court appears when it says that the United States was given the alternate right "to *retain* out of the contract price" the liquidated delay damages. Retention cannot, of course, be effected unless the contractor finishes the work.

This construction, urged by appellant in place of that adopted by Judge Pray in the case at bar, overlooks that the assumption that the contractor must necessarily finish is entirely unwarranted. It is inconsistent with the language of Article 9 that the contractor "*shall pay to the government* as fixed, agreed, and liquidated damages" the amount specified and that "the contractor *and his sureties* shall be liable for the amount thereof." The draftsman of the article recognized by this language that in addition to the cases where the delay damages could be retained from the contract price—the only situation contemplated by the *Cunningham* case construction, and now urged on this Court by appellant—there is the other situation where the contractor fails to complete the work and affirmative recovery, possibly from his surety, would be necessary. If appellant and

the District of Columbia Appeals Court were correct, liability of the surety would be unnecessary since the Government could always deduct and retain its delay damages out of the contract price.

Carried to its logical conclusion, appellant's proposed construction absolutely nullifies the provision for payment of liquidated delay damages in any case where the contractor, although allowed by the government to continue, ultimately refuses to finish. If the right to delay damages is conditioned upon the government's never taking over the work no matter how long the contractor's delay nor what the reason for it, then in every case the contractor and his surety can avoid liability for delay damages by the easy expedient of refusing to fulfill their obligation to continue the work, stopping just short of completion, and forcing the government to take over.

Appellant and the District of Columbia Court appear to concede that, if the work is not completed within the time originally agreed, the government has the right freely to elect to permit the contractor to continue and recover the stipulated damages for his delay. Under the *Cunningham* decision and the appellant's contention, however, the government's choice is only apparent and not real for the contractor can always defeat it since he must continue or the damages are forfeit. The effect of such a construction is that the government can recover only if *the contractor* elects to permit it to do so. He has only to stop at any time before completion and the government despite its previous election, can recover no delay. As the result of his stoppage the government

has a partially completed building for which the public has absolutely no use. As the contractor proceeded with the work, the government has paid him progress payments which may amount to almost the entire contract price. The delay may have been a month, or it may have been thirteen months as in the instant case. Yet what has the government gotten by its election to allow the contractor to proceed and what is it to do? An unfinished building is of no value to the public. It was not what the government contracted for nor what it requires. The contractor knows the government cannot and will not, in the public interest, allow the building to stand permanently unfinished. It must complete the work itself. Under appellant's contentions and the decision of the Court of Appeals of the District of Columbia, however, the moment the government commences to finish the building, a forfeiture occurs which relieves the contractor and his surety of all obligation to pay the liquidated damages which have accrued during the delay, and the government has only the right it elected not to exercise—to complete the building and recover the additional costs, if any. By quitting the contractor has deprived the government of its right to recover the agreed damages for the loss and inconvenience occasioned the public by the contractor's failure to finish the building when he agreed.

The District of Columbia Court of Appeals declares and appellant does not deny that the government has a choice of alternatives. A choice would presuppose a freedom of election by the government uncontrolled by

any act of the contractor or his surety. The result reached by the construction contended for, however, does not bear out the pronouncement, when the contractor by simply quitting before the building is finished can compel the government to complete it and work a forfeiture whereby he is released from his obligation to pay liquidated damages. Instead of the choice being given to the government it rests entirely with the contractor. It cannot be denied that the refusal to finish the building is a wrongful act of the contractor, yet if appellant and the District of Columbia Court are correct, it constitutes a case where a benefit may be obtained by reason of a wrongful act.⁸

It is submitted that such a construction of the parties' agreement is unworkable to the point of absurdity. The only reasonable meaning of the contract would seem to be that when the contractor breaches the obligations im-

8. Cf. Madden, J., dissenting in *Maryland Casualty Co. v. United States*, *supra*, 93 Ct. Cls., at 258: "So long, however, as the work is left in the hands of the contractor, the delay in completion is his sole responsibility, and there is no reason why he should escape the agreed remedy for it by the easy expedient of prolonging it to a time when the government, needing the facilities contracted for, must take over and complete the work. If this becomes the established doctrine, the practice of the government, often advantageous to both parties, of refraining from taking over the work even though it seems certain that it will not be completed on time, in the hope that the contractor, spurred by the liquidated damages clause, will bend every effort toward a completion as soon as possible after the time, will no longer be prudent, since the contractor can often serve his interests better by doing nothing and thus compel the government to take over the work and forfeit the liquidated damages already accrued than by proceeding diligently. I see no reason for reading into the contract a provision which is not there, when the ends served by such interpolation are neither equitable nor otherwise desirable." See also this Court's decision in *Six Companies v. Joint Highway District*, 110 F. (2d) at 625, that: "It is not for delay in completion of the work that the damages are provided. The clause does not in terms or by implication empower the contractor to put an end to the accrual of liquidated damages by the mere process of refusing to go ahead after the time for completion has passed."

posed upon him by the second part of article 9, which came into force by the government's allowing him to continue, the government has the remedy the law gives for the breach of any contract; the right to be placed in as nearly the same position as possible. By the ordinary meaning of the article's second part, the government is entitled to the completed building and also to the value of the use and occupation of the building for the period of delay, stipulated, for convenience of proof, to be \$25 per day. Had the contractor performed his obligation, even appellant concedes, the government would have its completed building, and in addition the right to retain the agreed damages of \$25 for each day's delay. Appellant cannot deny that the contractor breached his obligation to complete the building and forced the government to do it. It is only reasonable, then, that besides the agreed value of the use and occupation, the government should also receive the equivalent of the completed building, that is to say, the additional cost of completing it.

There can be no question that the law established by this Court and by the Supreme Court is to the effect stated. *United States v. Harris*, (C. C. A. 9) 100 F. (2d) 268, 277; *Chicago, M. & St. P. Ry. Co. v. McCaull-Dinsmore Co.*, 253 U. S. 97, 100; *Wicker v. Hoppock*, 6 Wall. 94, 99. Upon breach of the contractor's obligation the government is entitled to be put in the situation it would have been in had the breach not occurred. If the contractor does not give the government a completed building, it cannot be in the position

it would have been in had the contractor fulfilled his obligation. If the contractor fails or refuses to complete the building, the government, being entitled to a completed building, is entitled to complete the building itself at the contractor's expense; in other words, to recover any excess cost it may be put to in finishing the work. When it recovers excess cost, its general damages due to the contractor's failure to deliver the building have been paid. It has the completed building for which it bargained. It has not, however, recovered all the damages it sustained as the proximate result of the contractor's breach. It has not been compensated for its special or consequential damages by reason of the loss of the use and occupation of the building during the time it was rightfully entitled to use and occupy it. It retains, therefore, its right to recover from the contractor the value of the use and occupation which he expressly agreed to pay at the rate of \$25 per day for each calendar day's delay in the delivery of the completed building. Only when it receives such liquidated delay damages has it recovered all the loss which it sustained by the contractor's wrongful act.

It is submitted, therefore, that the construction, contended for by the appellant and adopted by the Court of Appeals in the *Cunningham* case, falls into error by holding the government entitled to receive more when the contractor performs faithfully and less when he defaults wrongfully. The result is absurd and can be arrived at only by doing violence to the contract terms. It is necessary to ignore the provision of Article 9, re-

quiring the contractor to continue the work if the government permits him to do so, and to read into the article a provision whereby the government's right to delay damages is forfeited whenever it is compelled to finish the work by the contractor's wrongful refusal to do so. The correct and just principle of construction is to take the language of the contract in its ordinary and natural meaning and to give effect equally to all its parts. *E. I. du Pont de Nemours and Co. v. Claiborne-Reno Co.* (C. C. A. 8) 64 F. (2d) 224, 227-228, cert. den. 290 U. S. 646. This the Court below did in the construction which he adopted and there is no answer to the reasoning of his opinion. See esp. 44 F. Supp. at 872.

II

Appellant and not the government had the burden of establishing whether or not the specifications for the completion contract deviated materially from those for the unperformed part of the defaulted original contract.

Appellant's second and, it would seem, decidedly subsidiary contention is that the action of the district court in awarding the government the additional cost of completing the building is not supported by evidence because there was insufficient proof that the completion contract was "in accordance with the specifications, plans and drawings of the Grogan contract." ((Appellant's brief, pp. 20-22.) Appellant urges that all the government's evidence as to the amounts it paid for the performance

and supervision of the completion contract, including appellant's own admissions on the point, was irrelevant and inadmissible because the government's proof failed to sufficiently establish the identity of the completion contract with the unperformed part of the defaulted contract.

The record shows, however, that the contracting officer⁹ gave appellant notice (Ex. 8, R. 41) that a government construction engineer would take inventory of the state of the work and invited appellant to have a representative present. Appellant was also requested to advise whether it desired to complete the work. Appellant made no reply concerning representation at the taking of inventory and so far as the record discloses never objected to the inventory and completion specifications approved by the contracting officer. Appellant instead replied (Ex. 9, R. 42) stating it did not desire to complete the work and specifically instructed the contracting officer: "We therefore request that bids be obtained and the contract awarded to the lowest bidder." The invitation for bids

9. The contracting officer who executed the original contract on June 24, 1931, was Perry K. Heath, Assistant Secretary of the Treasury. The contract provided (Art. 17 (6), R. 21) that the term "contracting officer" included his duly appointed successor or duly authorized representative. By section 1 of Executive Order No. 6166, June 10, 1933 (5 U. S. C. 132) there was created a Procurement Division in the Treasury Department at the head of which was placed a Director of Procurement, and the office of the Supervising Architect of the Treasury Department was transferred to the new division. Judicial notice may be taken that the Director of Procurement, Admiral G. P. Peoples, who signed Exhibit 9, became thereby the successor to the original contracting officer and that the Acting Director of Procurement, W. E. Reynolds, Assistant Director, who signed Exhibit 12, the completion contract, was the contracting officer's duly authorized representative. *N. Y. & Md. R. R. Co. v. Winans*, 17 How. 30, 40; *Cooper v. O'Connor*, (App. D. C.) 99 F. (2d) 135, cert. den. 305 U. S. 643; *Davidson v. Payne* (C. C. A. 8) 289 Fed. 69.

to complete the work (Ex. 10, R. 44) and the completion contract (Ex. 11, R. 49) were admitted by the district judge over appellant's objection that the government must first show that the plans and specifications of the completion contract were identical with those of the defaulted original contract (R. 43 and 48). These documents disclose on their face that the new contract was declared by the Acting Director of Procurement, who must be taken to be the authorized representative, if not the successor, of the contracting officer (see *supra*, note 9), to be "for completion of construction of the United States Inspection Station at Babb-Piegan, Montana" (R. 44 and 50).

With the evidence in this state appellant did not challenge the reasonableness and good faith of the determination by the contracting officer or his representative embodied in the completion specifications as to the work necessary to complete the building. On the contrary, appellant expressly agreed (R. 73) as to the amounts of the items properly chargeable to the contractor as involving the completion of the original Grogan contract and of those for work not included in the original contract and indicated throughout the official records to be extra work. Proof of the identity or difference of the work done under the completing contract from that provided for by the Grogan contract could only be made by the official records. The ordinary procedure is by comparing the specifications of the original contract, and the inventory of the state of work thereunder when the Government took over, with the specifications for com-

pletion. See *Zimmerman v. Jourgensen*, 24 N. Y. S. 170, 175. Appellant, however, although the government had the documents present in court as part of the 398 page certified photostatic transcript of the official record (R. 34 and 36), made no effort to place the two sets of specifications and the inventory in evidence.¹⁰ Appellant in fact, declined to introduce proof of any point whatever and rested its defense solely on the insufficiency of the government's case on both the law and the facts (R. 74-75).

In this state of the record the government submits that the questions of the correctness of the inventory of the state of work when taken over by the government and of whether the completion contract was for the unperformed part of the defaulted contract were questions of fact as to which appellant is bound under Article 15 of the contract¹¹ in the absence of clear proof of bad faith or arbitrary conduct by the government officers. The government further submits that appellant's letter (R. 42), directing the contracting office to obtain bids

10. Government counsel deviated from the frequent practice of itself putting the inventory and specifications in evidence along with the contracts to which they respectively pertain. This was done not only because it is believed they are not an essential part of the government's case in chief, but also out of deference to appellant's general criticism that "we are encumbering the record with unnecessary documents." (See e. g. R. 37).

11. The provision in question (R. 19) is as follows: "Article 15. **Disputes.**—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed."

and make an award to the lowest bidder, reinforced Article 15 and made the contracting officer appellant's agent for the purpose so that the appellant is bound by his action in the absence of similar proof of bad faith. Accordingly, it is maintained that far from the government being obliged to introduce evidence to negative in advance every possible difference in the completion of specifications from those for the unperformed part of the defaulted contract, appellant was under the duty of showing the decision of the contracting officer and the head of the Department on appeal was not reasonable and in good faith. Finally, even in the absence of these considerations, it is believed that proof of the government's actual cost for completing the abandoned contract is sufficient, since in the absence of any evidence to the contrary it tended to prove what was the reasonable cost of giving the government the finished building it contracted for.

1. *Whether the contracting officer contracted for the completion of the building on the same specifications as the original contract and whether the employment of engineers to supervise completion were necessary were questions of fact on which Article 15 made his determination binding.*—By Article 15 of the contract (R. 19, see *supra*, note 11) the parties agreed that the contracting officer or his representative should decide all disputes concerning questions of fact arising under the contract. The contractor's failure to continue operations, which required the government to take over and arrange to complete

the work, required the contracting officer to make a number of determinations of fact. The contracting officer's approval of the inventory of the state of work, his determination regarding the employment of a construction engineer to supervise the completion, and his issuance of the proposal and specifications for the completion contract which he had to base on the inventory and the original specifications, all constituted decisions on such questions. Accordingly these determinations of the contracting officer are binding on appellant in the absence of proof that its principal or itself had exhausted the administrative appeal to the head of the department provided by the article and that the government's officers were guilty of bad faith or of action so arbitrary and capricious as to be equivalent thereto.

Questions of this character, involving as they do the technical matter of interpretation of the specifications and the question of just what work thereunder was completed by the original contractor and what requires to be done, are matters peculiarly suitable for binding determination by an impartial arbitrator familiar with the special problems. The court have accordingly repeatedly sustained their binding force. As the Court said in *Ogden v. United States* (C. C. A. 5) 60 Fed, 725, 726:

This particular work was in charge of a captain of engineers in the United States Army. No referee more accessible, competent, or impartial could be suggested than such officer should have been. In the absence of fraud, or such gross error or mistake as would imply bad faith, his decisions must be upheld as conclusive on the appellants.

Moreover, appellant was further protected by the right of appeal to the head of the department. As the Supreme Court said in holding such a clause binding in *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 393:

Counsel intimates unfairness on the part of the Supervising Architect, but there is no just foundation for it; and besides, there is no attempt to impugn the good faith of the Secretary of the Treasury who sustained the decision of the Architect, and the contract explicitly provides that the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications shall be final.

It is competent for the parties to leave to the engineer or contracting officer the entire question of the liability of the defaulting contractor and his surety for additional cost or delay damages. *Conneaut Lake Agricultural Assn. v. Pittsburg Surety Co.*, 225 Pa. 592, 74 Atl. 620; *American Bonding Co. v. Gibson County* (C. C. A. 6) 127 Fed. 671; *Greenbay Lumber Co v. Odebolt School Dist.*, 125 Iowa 227, 101 N. W. 84, 87; compare the decision of this Court in *United States v. Harris*, 100 F. (2d) 268, 278, that the estimate of damage by the Secretary of the Interior was binding. A fortiori the parties may, as in the U. S. Standard Form Construction Contract here involved, leave to him the final determination of questions of fact on which such liability is founded. While no case involving decisions on questions of fact concerning the preparation of the invitation and specifications for the completion contract has been found, it is believed that this is due to the novelty of appellant's

contention that the government is bound to introduce evidence to negative the absence of any possible difference. It is believed, however, that the matter is obvious on principle. The somewhat similar problem, at the inception of the contract, of whether the surety tendered by the contractor is financially qualified, was held by the Third Circuit to be a question of fact within Article 15 so that the contracting officer's decision was binding. *United States v. Iovacchini* (C. C. A. 3) 116 F. (2d) 345, 346.

It is well settled of course that failure to exhaust the administrative remedy by not taking the appeal provided by such clauses is a complete bar to either a defense or a recovery on the ground of error or mistake in the contracting officer's determination. *United States v. Ellis*, 2 Ariz. 253, 14 Pac. 300; *American Bridge Co. v. United States* (W. D. Pa.) 25 F. Supp. 714, 715; *Bowe v. United States* (C. C. Ga.), 42 Fed. 761, 765, *Bray v. United States*, 46 Ct. Cls. 132, 138; *Fitzgibbon v. United States*, 52 Ct. Cls. 164, 169; *Roberts v. Westinghouse Mfg. Co.* (C. C. A. 8), 143 Fed. 218, 224; *United States v. Callahan Walker Const. Co.*, 317 U. S., 63 S. Ct., 87 L. Ed. 91, 93. It is equally well settled that an unappealed determination, even if not wisely made, is conclusive upon the contractor, his surety, the government and the Court in the absence of bad faith or arbitrary action implying bad faith. *Chicago & S. F. R. R. Co. v. Price*, 138 U. S. 185, 195; *Pauly Jail Bldg. Co. v. Hemphill County* (C. C. A. 5), 62 Fed. 699, 704. The fact that there is no proof as to

how the contracting officer reached his decision is immaterial. It is to be presumed that the duty was properly performed. *United States v. Harris* (C. C. A. 9), 100 F. (2d) 268, 278. The determination need be only implicit in the action of the contracting officer or engineer in the performance of his regular duties concerning the contract and does not require stating his reasons or making formal findings. His mere written orders or other acts are the exercise of the power. *United States v. Shrewsbury*, 23 Wall. 508, 516; *Kihlberg v. United States*, 97 U. S. 398, 401. Actual submission of a controversy is not required. *Boettler v. Tendrick*, 73 Tex. 488, 11 S. W. 497, 499; *Denver S. P. & P. Ry. Co. v. Riley*, 7 Colo. 494, 4 Pac. 785. Neither notice and hearing nor similar formalities are necessary unless the contract so requires. *Norcross v. Wyman*, 187 Mass. 25, 72 N. E. 347, 348; *Sweet v. Morrison*, 116 N. Y. 19, 22 N. E. 276, 279.

2. *Not only was appellant as surety bound by the contracting officer's determination because of Article 15, but because appellant made him its agent by giving him specific instructions.*—It appears from Exhibit 8 (R. 42) that on July 23, 1934, appellant wrote to the Director of Procurement, who by the reorganization of the office of the Supervising Architect was then contracting officer as successor in function to Assistant Secretary Heath, advising him that it did not desire to complete the work, but requesting that bids be obtained and the contract awarded to the lowest bidder. It appears further from

Exhibit 10 (R. 44) that the contracting officers' representative did exactly what the appellant requested and advertised for bids for completing the construction of the United States Inspection Station at Babb-Piegan, Montana. It appears further from Exhibit 11 (R. 49) that the contract as let specifically provided it was for completion of the construction of this station.

In the bids, it was recited, of course, that specifications might be obtained from the government and the contract itself required the work to be done according to the prescribed specifications for the completion of construction of the station, which were declared to be part of the contract. The government, in its original contract with Grogan, had likewise required the work to be done according to certain specifications and had these specifications on file for use in taking the inventory. Undoubtedly, the work of completing the defaulted original contract had to be done in accordance with new specifications excluding that part of the work already done, but there is not a scintilla of evidence in the case that the contracting officer did not follow appellant's instructions and have the work of completing the building done under specifications containing the same provisions as those which would have controlled Grogan had he fulfilled his contract and completed the work. It is familiar law that until the contrary is proven it is presumed that an agent just as a public officer will do his duty and follow instructions. Appellant never by pleading nor proof has asserted the contracting officer did otherwise. Both his duty to the government and the instructions of ap-

pellant alike required the contracting officer to relet the contract to the lowest bidder on specifications providing for the same work as had been abandoned. In the absence of clear proof he must be deemed to have done so. *United States v. Chemical Foundation*, 272 U. S. 1, 14-15; *Reynolds v. United States* (C. C. A. 7), 70 F. (2d) 39, 41, cert. den. 293 U. S. 590; *Arthur v. Unkart*, 96 U. S. 118, 122; *Smith v. United States* (D. C. Mont.), 32 F. Supp. 657, 659.

Even, however, had appellant shown that the contracting officer made some changes in the specifications, that, of itself, would not have been sufficient to sustain appellant's position that the government's right to additional cost was not sufficiently proven. Appellant would have been required further to prove that the changes were such as to increase the cost of the completion of the work and thus operated to its damage. Changes materially lessening the cost of the work would obviously give appellant no complaint. Appellant made no contention at the trial, however, that any change to its disadvantage was made in the specifications; on the contrary, appellant freely agreed with government counsel as to what items for which the completing contractor was paid represented extras not in the Grogan contract. There is certainly no presumption that the specifications were changed, or that because of the default of the contractor, the contracting officer in having the work completed built a better or more expensive building for the purpose of mulcting appellant in damages.

The only proof here is that the contracting officer

offered the appellant an opportunity to go ahead and complete the building. The appellant, not content simply to inform the contracting officer that it did not desire to complete the work, went further and directed him to advertise for bids for completing the work and to let the job to the lowest bidder. From the written exhibits referred to, it appears that is exactly what the contracting officer did. His authorized representative, Assistant Director Reynolds, advertised for bids for the completion of the work and let the contract to the lowest bidder. Nothing is said in appellant's letter about the specifications at all. It, therefore, follows that if appellant believes that the contracting officer did not follow the instructions it gave in its letter, appellant must know in what particular its directions were not followed and should have shown by proper proof how the contracting officer did not follow its instructions. Unless appellant did so show, there is no presumption that the contracting officer did not, and appellant cannot, at this stage of the proceedings, without ever having raised the question by pleading or proof, now avoid the government's recovery of its damages by the mere assertion that the contracting officer might possibly not have done his duty and might not have followed appellant's directions or instructions, since the new specifications were "at least different in date." (Appellant's brief, p. 20.)

3. *Aside from special considerations, proof of the actual cost for completing the abandoned contract is sufficient to establish the reasonable cost of giving the government the equivalent of the building for which it contracted.*—Appellant has cited 3 Sutherland, Damages, Sec. 699, and certain other authorities for the proposition that in cases of defective performance of building or construction contracts, the general measure of damages is the reasonable cost of making the work conform to the original contract. The question here, however, is not one of defective performance and therefore of how far it is reasonable to tear out and do over the defective work. The sole question is one of completing the work abandoned by the original contractor.

The correct measure of damages is what will give the government as nearly as possible what it failed to obtain when the contractor defaulted. In the situation involved in the case at bar the same learned author cited by appellant has said (3 Sutherland, Damages (4th ed., 1916) Sec. 698 at p. 2592), "On a contractor's failure to perform in whole or in part the contractee may recover at least the difference between the contract price and the compensation he is obliged to pay under a new contract for the same work." So far as is known this rule has never been questioned. *Goldsboro v. Moffet* (C. C. N. C.) 49 Fed. 213, 216; *Mayor v. Second Ave. R. R. Co.*, 102 N. Y. 572, 7 N. E. 905, 906; *Dahlstrom Metallic Door Co. v. Evatt Const. Co.*, 256 Mass. 404, 152 N. E. 715, 719; *Bacigalupi v. Phoenix Bldg. Co.*, 14 Cal. App. 632, 112 Pac. 892; see *United States v. McMullen*, 222 U. S. 460, 471.

Whatever may be the rule as to the quantum of proof necessary to show that expenditures for work to remedy defects were reasonable and in accordance with the specifications, appellant has cited no authority holding that proof such as the district court had before it in the case at bar was insufficient to establish the damages for failure to complete the contract work. On the contrary, the only cases dealing even impliedly with the problem appear to indicate that, while the owner may not proceed recklessly, if he proceeds in the usual way and no fraud is shown nor any facts to impeach the reasonableness of the manner in which the abandoned work was done, the sum actually expended for the work is *prima facie* the damages the owner is entitled to recover. In the absence of proof, neither fraud on the defendant, nor recklessness, nor extravagance will be presumed and the actual cost is some evidence of the necessary and reasonable cost.

Thus in *Mayor v. Second Ave. R. R. Co.*, *supra*, the railway failed to pave between the car tracks and the city was compelled to do the work and brought suit for the cost it sustained in doing so. The city did not specifically prove that its expenditure was reasonable. Neither does there appear to have been any evidence that the work was done in precisely the same way as the contract required the railway to do it. The railway company objected like appellant in the present case. The Court held the city entitled to recover its actual expenditures in the absence of any proof to the contrary. Similarly in *Bacigalupi v. Phoenix Bldg. Co.*, *supra*, the surety contended, precisely as appellant in this case, that plaintiff had not shown the

building was completed in accordance with the original contract nor that its actual cost for completing the abandoned work was a reasonable cost. The Court stated that the evidence did show that the building was completed in accordance with the original contract although it does not appear from the report of just what the evidence consisted and it would seem probable that it was no more than the government's evidence in this case—that the contracts were for the same purpose. As to the question of reasonableness the Court remarked that no evidence had been given that the reasonable cost of completion was any less than what it had actually cost the plaintiff and concluded that in such circumstances evidence of the actual cost was sufficient.¹²

It is submitted that the question of whether the completion contract and the original contract are for the same work is in essence the same sort of question of reasonableness as is the amount of the owner's expenditure. It is elementary that the contractor who abandons the work cannot complain of reasonable changes in the completing contract unless they increase the cost and cannot be separately identified from the original contract work. *Rowe v. Peabody*, 207 Mass. 226, 93 N. E. 604, 607; *Delray Lumber Co. v. Keohane*, 132 Mich. 17,

12. Where the contract provides that the excess cost shall be the measure of damages it appears that even proof of want of due care is not sufficient. The defendant must prove bad faith. *Baer v. Sleicher* (C. C. A. 6) 153 Fed. 129, 132-133; *Mass. Bonding & Indemnity Co. v. John B. Thompson* (C. C. A. 8) 88 F. (2d) 825, 830, cert. den. 301 U. S. 707. Expert testimony as to reasonable cost is irrelevant. *Riley v. Kenney*, 33 Misc. 384, 67 N. Y. S. 584, 585; *Zimmerman v. Jourgensen*, 14 N. Y. S. 548, 549, further pro. 24 N. Y. S. 170.

92 N. W. 489; *Board of Education v. Maryland Casualty Co.* (C. C. A. 3), 27 F. (2d) 20; cf. *Christopher Co. v. Yeager*, 202 Ill. 486, 67 N. E. 166, 168. It would seem no more than consistent to require the defaulting contractor or his surety to present at least some evidence that a change was made which was not reasonable or which increased the cost.

In the case at bar such a requirement would seem particularly reasonable. Not only is there not a scintilla of evidence that there were any material changes in the specifications for the completion contract, but appellant expressly agreed as to the amounts paid to the completing contractor which represented extra work not chargeable to Grogan's abandonment of the original contract (R. 73). If appellant could do this, apparently, simply by an inspection of the certified transcript of official records, it would not seem an undue burden to require him to point out any differences in the specifications in the same way. If it needed more time to examine the documents, it had every right and facility under Rule 35 to require production of the specifications before trial to permit comparison by its principal or any other builder or qualified expert.

In addition to the objection that the government has not affirmatively shown there were no deviations in the completion contract specifications from those for the abandoned part of the original contract, appellant adds at page 20 of its brief, although without much emphasis, that there was no proof "that the payments to Lavine and the other engineers were made because reasonably

necessary in connection with the completion of that station." Appellant does not contest the fact that the payments were actually made. That, it conceded at the trial (R. 73-74). It does not suggest even now in what respect it considers any part of the payments were not reasonably necessary. It simply asks that the proofs be reinforced.

The government submits that what has been said above on the general question of proof of reasonableness sufficiently disposes of this objection. It may be emphasized, however, that appellant presumably knew that a construction engineer had been at the site of the work throughout the time Grogan was actually working on the job and that it is the usual practice on all public works of any importance, whether state or federal. Appellant was notified by the contracting officer's letter (Ex. 8, R. 41) that the government would be required to send an engineer on the premises to take an inventory of the state work. Appellant in its reply made no objection and never claimed it was unnecessary. Since there is no presumption that the contracting officer would improperly order something unnecessary and appellant did not at the trial attempt to point out in what particulars the presence of the engineers was not necessary, appellant cannot now have the findings of the Trial Court set aside as unsupported. If such contentions have substance and merit, the time to present them is at the trial.

III

The United States was entitled to the allowance of interest from the date of the earliest demand for payment upon the whole of the damages awarded.

Appellant finally contends that the District Court erred in allowing interest upon the amounts of the recovery. In cases of contract default interest runs from the date of demand upon defendant for payment. *Miller v. Robertson*, 266 U. S. 243, 257; *United States Fidelity & Guaranty Co. v. United States*, 236 U. S. 512, 528-531; Restatement, Contracts, Sec. 337. The action is *ex contractu*, and the Supreme Court of the United States had occasion recently to consider the question of the applicability of the rule in *United States v. Sanborn*, 135 U. S. 271, relied upon by the appellant. In *Royal Indemnity Co. v. United States*, 313 U. S. 289, 296, the Court rejected the application of the equitable rule in cases of express contracts, saying:

Here, responsibility for delay in payment rests quite as much upon the debtor, who is chargeable with knowledge of its own obligation and the breach of it, as upon the creditor. And in the meantime the debtor has had the use of the money, of which its default has deprived the creditor. Interest upon the principal sum from the date of default, at a fair rate, is therefore an appropriate measure of damage for the delay in payment. (Citing cases.)

CONCLUSION

It is accordingly believed that on the record here, the United States has shown it was compelled to institute and prosecute this litigation because of the wrongful failure and refusal of the contractor and the appellant to perform their obligations to the government; that all the government asked in its suit was that it be made whole for the damage it sustained because of those wrongful acts of the contractor and the appellant; that the judgment entered by the Trial Court went no further than to enforce the obligations of the contractor and the appellant by making the government whole; and that no reason has been advanced which shows that this result reached by the Trial Court was not proper. It is therefore respectfully submitted that the Court below committed no error that in anywise adversely affected any material or substantial right of appellant and the judgment is correct and just and should be affirmed in toto.

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No. 10,229

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 12

AMERICAN SURETY COMPANY
(a corporation),

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT.

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FILED

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PAUL P. O'BRIEN,
CLERK

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VS.

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REPLY BRIEF FOR APPELLANT.

Appellant desires to emphasize at the outset of this reply brief that counsel for Appellee are mistaken, to say the least about it, in contending, as they do in the “Statement” in the brief for Appellee, that all the essential allegations of fact in the complaint, except as regards the amount of damages, are admitted either by the answer filed or by express admissions at the time of trial. On the contrary the Government was put to its proof by Appellant to establish the all-important allegations of the Government’s complaint herein (a) that it “completed” the Grogan contract, and (b) that it was damaged. Paragraphs IX and X (Tr. 6 and 7) and part of Paragraph XI (Tr. 8) of the said complaint, wherein is alleged completion of the Grogan contract by the Government, that it was

damaged and the amount of the damages, were expressly denied in the answer of Appellant (Tr. 31) and those allegations of the complaint were not admitted at the time of trial. The principal contention of Appellant, both by specification of errors and argument in its brief, has been and still is that the Government has wholly failed to prove either "completion" of the Grogan contract by it or the damages pleaded, and, hence, that there is no evidence in the record to support the judgment, either as to claimed "excess cost" or as to the item of damages for delay.

Thus counsel for the Government are also mistaken in asserting, as they have in their said brief, that the denials and assignments of error of Appellant go only to the amount of damages the Government may recover and not to the fact that the Government was damaged. Such is not the case at all. The specification of errors (page 4 of brief of Appellant) speaks for itself and contradicts the assertion as to its effect. The assertions regarding the denials of the Appellant are contrary to the record, as we have already pointed out.

THE MATTER OF LIQUIDATED DELAY DAMAGES.

It is sufficient reply, in the main, to the Appellee's argument on this subject to point out that all of the decisions of the Court of Claims construing contract provisions identical with those involved in the case at bar announce the rule for which Appellant contends here. In addition the United States Court of Appeals for the District of Columbia, likewise construing iden-

tical contract provisions, has decided by a full court that the Government may not recover liquidated damages under such conditions as exist in the case at bar, saying: "Similar provisions in government contracts have been consistently so construed by the Court of Claims." (citing cases).

It is instructive to note that in the said decision by the United States Court of Appeals for the District of Columbia, which is the *Cunningham* case (125 F. (2d) 28), the Court also says:

"The only case cited by the United States where liquidated damages and excess costs were both recovered under a contract such as we have here is *Continental Casualty Company v. United States*, 113 F. (2d) 284, affirming 29 F. Sup. 598, Certiorari denied 311 U. S. 696. However, the question whether these are alternative rights was not mentioned in either the Circuit Court or the District Court opinion and does not appear to have been raised by the parties. * * * The case is, therefore, not helpful on the point in discussion here."

The Government is still unable to cite any decision by the courts, other than the one appealed from herein, where the contract construction for which it contends has been upheld, and it does little more than rely upon certain dissenting opinions in the Court of Claims to sustain its position. In the latest decision by the Court of Claims, one that through inadvertence was not cited in our initial brief, the court divides on the question but the majority opinion supports the stand of the Appellant here. The case in question is that of

Maryland Casualty Company v. United States, decided March 3rd, 1941, and reported in 93 Court of Claims 247. The first portion of the syllabus of the case reads as follows, to-wit:

“Government contract; collection of both liquidated damages and excess costs.—Where the Government, in accordance with the terms of a construction contract, because of delay and default on the part of the contractor terminated said contract after the time provided for the completion thereof, and took over and completed the work; it is held that the Government may not collect both (1) liquidated damages for the period that elapsed after the time provided for completion and before the Government exercised its option to terminate said contract and (2) the excess costs which were incurred by the Government in completing the work.

Same; waiver.—The defendant, having exercised its right to terminate a construction contract and to proceed with its completion, thereby waived its claim to liquidated damages.”

In this *Maryland Casualty Company* case paragraph 9 of the contract involved was identical with paragraph 9 of the contract in the case at bar. There Government counsel contended that under the terms of the contract it was permitted to recover liquidated damages that had accrued before notice of termination and that after termination the Government was entitled to excess costs. That claim was rejected by the court which said:

“Article 9 gives the government the choice of permitting the contractor to continue and collect-

ing \$35.00 per day as liquidated damages for delay or pursuing the other course by taking over and finishing the work and collecting the excess cost incurred in the completion of the contract. By its terms it does not give the government the right to collect both. The defendant having exercised its right to terminate the contract and to proceed with its completion, it thereby waived its claim to liquidated damages. *Fidelity Casualty Co. of New York v. United States*, 81 C. Cls. 495; *Commercial Casualty Insurance Co. v. United States*, 83 C. Cls. 367; *American Employer's Insurance Company of Boston v. United States*, 91 C. Cls. 231; *U. S. for Use and Benefit of General Lighterage Company v. Maryland Casualty Co.*, 25 Fed. Supp. 778.

In each of these cases the work was completed after the Government had terminated the right of the contractor to proceed. In the *Fidelity* case, *supra*, the Government terminated the contract on the day that had been fixed for completion of the work. In each of the cases the work was actually completed after the date that had been fixed in the contract. In each of the cases the Government had been subjected to whatever damages might have been caused by the delay in completing the contract. It was held, however, that since the contractor's right to proceed in each case had been terminated, the defendant had chosen its course of procedure and would be limited to the excess costs incurred in the completion of the work. The *General Lighterage Company* case, *supra* (District Court, Maine), is in all respects similar to the case at bar. The issues involved in the two cases are identical.

The instant case is clearly distinguishable from American Employer's Insurance Co. case. In the latter case, a separable portion of a divisible contract which was to be completed at an earlier date had already been completed, but not within the date specified in the contract. The liquidated damages that attached to the delay in construction of that particular building had already accrued and had become due prior to the date of cancellation. The cancellation, therefore, was as to the other portion of the contract."

That two judges dissented in the case is rather beside the question. The fact still remains that the majority of the court decided the case as stated, *supra*, and that the rule there announced became the law applicable to a contract such as the one here involved. On reason as well as precedent the decision should be the law of the case at bar. The able but wordy argument of Government counsel on the liquidated damage question seems to Appellant to be nothing more nor less than a labored attempt to persuade this court to read into the contract here matter which it does not contain and which the courts refuse to interpolate as that would be making a new contract for the parties. Courts are without power to change the contract of the parties.

The Government, therefore, is mistaken in stating (page 10 of Appellee's brief) that the few reported cases on the construction given government contract provisions such as are found in Article 9 of the construction contract here are inconsistent with each other. They are further mistaken in saying that the

clearer, more cogently reasoned decisions are in accord with that of the trial court from which the appeal herein has been taken. As a matter of fact there are no reported decisions other than that of the trial court that support the Government's position here. Neither are there any decisions, either cogently reasoned or otherwise, that are in accord with that of the court below.

It should be noted, too, that the Government disregards, in its argument on the question of liquidated damages and on the effect of Article 9 of the construction contract, that this court must be governed by what "the draftsman" for the Government did in his use of language in the contract here and not by what he "dealt with", had in mind to do or was directed to do. Here the draftsman has used plain language that measures and settles the matter of intent for all concerned and leaves the entire argument of the Government without any support or foundation whatever.

It may be, as we have said in our initial brief, that the Government might recover damages for delay as part of its "excess cost", but it is elementary that any such damages for delay would have to be pleaded as a basis for their recovery. Here there is no pleading basis for the recovery of such special damages. But otherwise there is no right here to delay damages as the contract makes plain and the courts have decided. We stand, therefore, as heretofore, upon the claim that the award by the trial court of liquidated damages is contrary to the plain and unambiguous terms of the contract and that it is without support in the decided cases.

THE MATTER OF THE DAMAGE ITEM OF \$2044.04.

The Government in its complaint alleges:

“That because of the wrongful refusal of the said Defendant John V. Grogan to complete his said contract * * * it became necessary for the plaintiff to complete and cause the said work to be completed and that in doing the same and completing the said work the plaintiff expended in the completion of the same the sum of \$3781.00, which said sum was and is the reasonable value of completing the said work that the said defendant John V. Grogan promised and agreed to do and complete (Tr. 6) * * * That by reason of the wrongful failure and refusal of the said Defendant John W. Grogan to perform his said contract and to complete the work that he had promised and agreed to complete, the plaintiff was required to and did lay out and expend the sum of \$6,483.62 in completing the said work.”
(Tr. 7.)

These allegations of the complaint were specifically denied in the answer of the Appellant (Tr. 31). Thus the Government had the burden of proof under the pleadings to establish the completion of the Grogan contract by it—a burden that was never shifted or changed. That this burden was not sustained by the Government is established by previous argument in Appellant’s initial brief (pages 18 and 19). In this reply brief we now merely emphasize where the burden of proof lay under the pleadings—a burden that the Government assumed by its own complaint and one which it had to assume to establish its claim against the Appellant. Yet in the face of this condition of the

record we now find the Government contending in the brief for Appellee that the Appellant had the burden of establishing that the contract made by the Government after Grogan's default was not in fact a completed contract. This claim of the Government in the light of the pleadings is without any warrant whatsoever and deserves no further reply than has already been given to it.

Incidentally, it should be remembered as to the Government's further argument in this connection that the Government terminated the Grogan contract. Thus in paragraph VIII of the complaint (Tr. 5 and 6) it is specifically alleged by the Government that:

"The plaintiff acting under the authority given to it in the said contract and in accordance with the terms thereof on the said 20th day of July, 1934, notified the said Defendant John V. Grogan in writing that his right to proceed under the said contract was terminated on said date."

Article 15 of the Grogan contract (Tr. 19), now relied upon by the Government, relates to disputes concerning questions of fact arising under that particular contract. Since Grogan's right was terminated under the contract in question, Article 15 thereof had no application thereafter to anything concerning or affecting Grogan or his rights or liabilities and certainly not to disputes arising under a later and separate contract.

In no respect did the Government sustain its burden of proof as to the damage item in question. It did not show completion of the contract as required. Further-

more, it particularly did not even pretend to sustain the burden of proof cast upon it under the further allegations of paragraph 9 of its complaint (Tr. 6 and 7), namely, that it was required to pay its construction engineer for necessary services performed the sum of \$2288.62 and the sum of \$414.00 for expenses of engineers and their salaries.

With entire respect to counsel for the Government, Appellant contends that they have merely clouded the issue in their argument on this point, that the argument is without foundation in fact or in law, and that it is wholly unwarranted under the record. This seems to us to be a case where the Government has simply failed in its proof and is seeking now to disguise that fact with lengthy and wholly irrelevant argument.

THE MATTER OF INTEREST.

This argument is addressed to paragraph III of Appellee's brief. Therein the Appellee relies principally upon *Royal Indemnity Company v. United States*, 313 U. S. 289-296, 85 L. Ed. 1361, to support its claim that the lower court properly allowed interest prior to judgment upon the items of damages allowed in the judgment. But the *Royal Indemnity Company* case, as the court itself declares, is "a suit at law for the recovery of an amount due and owing which petitioner has contracted to pay". Here we have no such condition at all. In the case at bar, we are concerned with an action for alleged damages for claimed breach of a construction contract, and neither

the contractor nor the surety on his bond has contracted to pay the Government a stated sum that is either due or owing ^{to} to a debt under the construction contract. The *Royal Indemnity Company* case, *supra*, is not in point, accordingly, and there is no warrant whatever for citing it as an authority here.

Appellant stands now, as heretofore, upon the doctrine of *U. S. v. Sanborn*, 135 U. S. 271, 34 L. Ed. 122. It stands also upon such further controlling authority as *Redfield, et al. v. Bartel, et al.*, 139 U. S. 694, 35 L. Ed. 310. In the *Redfield* case the court holds:

“Where interest is recoverable, not as part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld.”

In *United States v. Sanborn*, *supra*, that rule is applied to the Government. This court has recognized the rule in question in *Huntley v. Southern Oregon Sales, Inc.* (C.C.A. 9), 104 F. (2d) 153 and 154.

Here is a case where it appears, from vouchers produced by the Government, that its payments, which it seeks to recover in this action as damages, were completed in 1935 (Tr. 72). It made no demand upon Appellant for payment thereof until November 1st, 1937. This action at bar to recover damages was not filed until nearly three years later, to-wit: Upon August 5th, 1940. The rule of the *Redfield* case is applicable. Furthermore, the damages sought by the Government did not become liquidated in any event as to amount until April, 1942, when the trial court made

its findings of fact and conclusions of law upon which the judgment herein appealed from was entered. In the light of the facts there is no justification for the allowance of interest here prior to judgment on any damages recoverable by the Government.

CONCLUSION.

It is respectfully submitted that there is nothing in the brief for the Appellee that either meets or overcomes the contentions of the Appellant on this appeal. The Government has wholly failed to establish essential allegations of its complaint and is without legal right under the record to recover anything herein. Accordingly the judgment should be reversed and the action dismissed.

Dated, Billings, Montana,
February 1, 1943.

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